ICC88

Interstate Commerce Commission

1988 Annual Report

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LETTER OF TRANSMITTAL

To the Congress of the United States

Washington, D.C. April 4, 1989

It is my pleasure to submit the one hundred and second Annual Report of the Interstate Commerce Commission, in accordance with the Interstate Commerce Act.

The report generally embraces the fiscal year ended September 30, 1988, except in the discussion of significant actions that transcend the 12-month period, or where necessary to confirm to various statistical analyses.

The statement of appropriations and aggregate expenditures for the 1988 fiscal year appears in Appendix D.

Heather J. Gradison
Chairman

THE COMMISSION

(As of September 30, 1988)

	Appointed	Term Expires Dec. 31
Heather J. Gradison, *Chairman* (R) Ohio	1982	1988
Frederic N. Andre, *Vice Chairman* (R) Indiana	1982	1987
Paul H. Lamboley, (D) Nevada	1984	1989
J.J. Simmons III, (D) Oklahoma	1984	1990
Karen Borlaug Phillips, (R) Virginia	1988	1991

Commissioner Karen Borlaug Phillips joined the Commission on August 11, 1988, to fill a position vacated by former Commissioner Malcolm M.B. Sterrett whose term of office had expired on December 31, 1987, but who continued to serve until Commissioner Phillips was confirmed by the Senate.

The Commissioners. From the left, Commissioner Paul H. Lamboley, Vice Chairman, Frederic N. Andre, Chairman Heather J. Gradison, Commissioner J.J. Simmons III, and Commissioner Karen Borlaug Phillips.

Functions and Responsibility

The Interstate Commerce Commission is an independent Federal agency responsible for regulating interstate surface transportation within the United States. In carrying out its regulatory responsibilities, the Commission attempts to ensure that competitive, efficient, and safe transportation services are provided to meet the needs of shippers, receivers, and consumers.

The ICC today maintains jurisdiction over some 44,880 for-hire companies providing surface transportation in the U.S. These companies include railroads, trucking firms, bus lines, water carriers, one coal slurry pipeline, household goods transporters, and freight forwarders.

The Interstate Commerce Commissioners are appointed by the President and confirmed by the Senate. The ICC is authorized to have five Commissioners, each with a five-year term of office.

How the ICC Operates

The Commissioners supervise all of the ICC's activities and delegate specific authorities to the Commission's 12 bureaus and offices.

As the executive head of the Commission, the Chairman coordinates and organizes the agency's work and acts as its representative in legislative matters and in relations with other governmental agencies. In addition, the Chairman is generally responsible for:

1. Overall Commission management and operations;
2. Formulation of plans and policies designed to ensure Commission effectiveness and the able administration of the Interstate Commerce Act;
3. Identification and resolution of major regulatory problems; and
4. Development and utilization of effective, expert staff support for the fulfillment of the Commission's many duties and functions.

The Vice Chairman represents the Commission and assumes the Chairman's duties during the Chairman's absence or illness. Additionally, the Commission delegates several important functions to the Vice Chairman, including oversight of matters involving the admission, disbarment, or discipline of Interstate Commerce Commission practitioners.

During fiscal year 1988, the Commission's activities were carried out through an organizational structure consisting of the Commission's bureaus and offices as follows:

- Office of Public Assistance (Special Counsel)—functions as a clearing house for resolution of small-business problems relative to surface transportation regulation and advises the Commission on the nature and status of such problems, contributes to the public-interest record in Commission proceedings and assists individuals, consumer groups, small communities, small shippers, and public utility commission officials participating in those proceedings.

- Office of Government and Public Affairs—analyzes legislative proposals, assists in the development of the Commission's own legislative proposals, aids Congress in drafting of legislation, assists in the preparation of testimony to be presented before Congressional committees, assists Members of Congress and other representatives of the 50 states with matters pertaining to the work of the Commission, furnishes information

to the general public and the media concerning ICC decisions and activities, conducts briefings for the media and U.S. and foreign visitors, and prepares the ICC's Annual Report to Congress.

- Office of Human Relations—manages the Commission's program to provide equal employment opportunity for all employees and applicants, and provides training in the area of human relations.
- Office of the Managing Director—manages the Commission's day-to-day operations.
- Office of the Secretary—serves as the Commission's documentation center and is responsible for the issuance of the Commission's decisions and other legal documents.
- Office of the General Counsel—renders legal opinions to the Commission, and defends Commission decisions challenged in court.
- Office of Hearings—staffed by Administrative Law Judges, this office conducts various hearings for the Commission.
- Office of Transportation Analysis—conducts economic and statistical analyses of the transportation industry and provides economic advice to the Commission upon need or request.
- Office of Proceedings—processes formal ICC cases pertaining to operating rights, financial matters, rates, and competitive practices.
- Office of Compliance and Consumer Assistance—monitors the activities of railroads, trucking companies, barge lines, freight forwarders, and rate bureaus to ensure compliance with ICC policies; and assists the public in the resolution of complaints against ICC-regulated companies.
- Bureau of Accounts—prescribes uniform accounting and reporting rules, reviews various financial reports, analyzes cost and financial evidence submitted by parties to proceedings before the Commission, compiles and publishes transportation statistics and cost studies, and conducts audits of pertinent records of transportation firms.
- Bureau of Traffic—monitors tariff publication, filing, and interpretation, and suspends any unreasonable or unlawful tariffs before they may become effective.

YEAR IN REVIEW

On October 9, 1987, the Interstate Commerce Commission determined that CSX Transportation, Inc. could not lawfully take a "zone of rate freedom" increase on a rate for certain coal movements that was prescribed in 1977, and the Commission ordered refunds to the involved shipper.

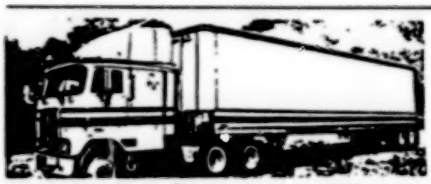
The Commission heard oral argument on October 21 to consider the effect on rail labor of, and the appropriate labor-protective conditions for, a series of proposed leases from four rail carrier subsidiaries of Guilford Transportation Industries, Inc., to a fifth carrier subsidiary, the Springfield Terminal Railway Company.

The Commission also initiated a rulemaking proceeding on October 21 to consider accepting electronically filed tariffs as an alternative to the traditional means of filing tariffs in paper form. The Commission's acceptance of such modern technology would better serve the public and carriers through this improved means of business communication which could further spur competition among carriers in various transportation modes. The initiation of this rulemaking proceeding followed the Commission's successful introduction last fiscal year of prototype electronic tariff filings for the limited purpose of determining highway distances for the assessment of freight charges. Three motor carrier organizations, including a major carrier rate bureau, now utilize electronic tariff filings of this type.

On November 3, the Commission decided that the rate cap on the railroad transportation of nonferrous recyclables for 1987 should be set at 149.8 percent of revenue-to-variable costs. On November 17, an oral argument was held to consider the issue of the Chicago and North Western Transportation Company's market dominance over certain rail shipments of pulpwood and wood chips moving in the West and Midwest.

On December 1, the Commission heard oral argument to consider the Union Pacific Railroad's proposed acquisition of the Missouri-Kansas-Texas Railroad Company and, in the motor transportation area, it adopted amended rules providing procedures for public and private recipients of governmental financial assistance to apply for motor common carrier authority to transport passengers. This latter action implemented provisions of recent legislation that had adopted additional public-interest factors to be considered in evaluating applications by assistance recipients.

On December 2, the Commission voted to adopt amendments to its rail-banking and interim trail-use rules under the National Trails System Act. Following oral argument on December 17, the Commission voted, in an open voting conference held on December 22, not to impose labor-protective conditions on the sale of the Eureka Southern Railroad's Eel River Line near Eureka, California, to the Northwestern Pacific Railroad Company. In this proceeding, the Railway Labor Executives' Association argued that labor-protective conditions should be imposed to benefit employees adversely affected by the sale of a rail line under the class-exemption rules for acquisitions of rail lines by noncarriers. The Commission determined, however, that the wages and benefits provided to affected employees had not been shown to be inadequate or inappropriate, and that the carriers involved



were not in a financial condition to absorb the cost of labor-protective conditions.

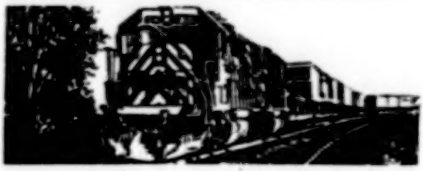
On January 28, 1988, the Commission adopted rules delegating authority to the Director of the Commission's Office of Proceedings to decide initially whether to impose environmental and historic-preservation conditions in certain rail abandonment proceedings. These rules followed the Commission's earlier, successful delegation to the Director of certain other authority under its abandonment-exemption procedures. On January 29, the Commission issued a declaratory order in a case considering a proposed rail line sale and acquisition by the FRVR Corporation. The Commission set standards for the imposition of labor-protective conditions for rail acquisitions by new carriers and held that the Interstate Commerce Act preempts other rail labor acts once the Commission has approved a rail acquisition transaction.

On February 2, the Commission adopted final railroad transportation contract rules, responding to both a court remand of its earlier rules and to new legislation requiring greater disclosure of the terms of agricultural commodity contracts. On February 5, the Commission decided that Burlington Northern Railroad Company's rates on wheat and barley from Montana to Pacific Northwest ports exceeded a reasonable maximum level and ordered reparations to shippers.

On February 11, the Commission adopted modifications to the class exemption of rail acquisitions by new carriers to provide additional notice and time for comments concerning the creation of new Class I or Class II carriers. On this date, the Commission also revised its accounting and reporting requirements for motor carriers of passengers by changing the levels of gross annual carrier operating revenues defining the classes of motor carriers of passengers. Under this change, Class I bus carriers are now classified as those whose annual revenues are $5 million or more (price-indexed to reflect inflation), instead of the former $3 million (non-price indexed) level. Consequently, the reporting burden for approximately 11 bus companies with annual revenues below this level will be eliminated.

On February 17, the Commission decided that intercorporate transactions regarding Guilford Transportation Industries's subsidiaries collectively caused substantial injury to Guilford's employees, and it imposed extraordinary labor-protective conditions on those transactions. In other transportation areas, the Commission on this date adopted final revised rules simplifying the procedures that enable motor passenger and property carriers, water carriers, property brokers, and household goods freight forwarders to obtain Commission approval to merge, transfer, or lease their operating rights in certain "small carrier" financial transactions. The Commission also amended its regulations to make safety fitness a substantive issue for consideration in deciding whether to approve certain transfers or to grant exemptions for purchases of motor carrier authority.

During the month of February, the Commission's Office of Compliance and Consumer Assistance issued two reports based on staff studies of the household goods carrier industry. The studies covered the moving industry's compliance with the requirement that tariff



charges be refunded to consumers for lost or destroyed articles, and addressed the effectiveness of Commission-approved, dispute-resolution programs between carriers and consumers.

On March 3, the Commission announced that it would routinely stay the effectiveness of exemptions granted for out-of-service rail lines when an informed environmental impact decision cannot be made. It was on this date that the Commission also adopted amendments to its credit regulations to allow carriers to assess reasonable collection-expense charges against shippers that fail to pay their freight bills on time. While allowing carriers several options, the rules contain provisions protecting shippers from deception or unjust discrimination.

On March 16, the Commission submitted to the Equal Employment Opportunity Commission its multi-year (i.e., 1988-92) Affirmative Program Plan for Minorities and Women. On March 18 the Commission issued its decision granting the National Rail Passenger Corporation (AmTrak) access for its intercity passenger trains over the lines of the Chicago & Western Indiana Railroad Company and over those of the Belt Railway Company of Chicago.

On the 28th of March, following an extensive environmental impact study, the Commission issued its decision approving the Baltimore and Ohio Railroad Company, the Metropolitan Southern Railroad Company, and the Western Maryland Railway Company's abandonment of its "Georgetown Branch" line running through Montgomery County, Maryland, and the District of Columbia. In a decision issued on March 30, the Commission adopted final rules authorizing property brokers to file prescribed trust fund agreements, as an alternate to surety bonds, as evidence of financial responsibility.

Initiated partly in response to public complaint, the Commission's Office of Compliance and Consumer Assistance undertook a systemwide survey of the operations of Guilford Transportation Industries, Inc., during the month of March. The survey focused on 22 principal facilities on Guilford's system relative to the operations at each facility, the transit times for loaded and empty rail cars moving through the facilities surveyed, and the reactions of shippers regarding Guilford's service.

On April 12, the Commission instituted an investigation of a Southern Pacific Transportation Company proposal to establish certain new switching charges. The investigation was later expanded to include responsive actions by connecting rail carriers. In a decision issued on April 14, the Commission ruled that, in rail-motor common control situations arising from grants of new authority in licensing proceedings, a separate application for continuance in control would no longer be required. The Commission eliminated the burdensome requirement of dual scrutiny in view of the fact that corporate families in such situations essentially are acquiring additional operating authority, and not control, of a carrier.

On May 13, the Commission approved the Union Pacific Railroad's acquisition of the Missouri-Kansas-Texas Railroad Company and found that that consolidation would provide improved efficiencies in service and reduced transportation costs. The transaction was made subject to limited competitive and labor-protective conditions. On this date, the Commission also issued proposed rulemakings to modify its

regulations concerning rail abandonments and light-density surcharges. These proposals reflect recent findings of the Railroad Accounting Principles Board.

On May 17, the Commission held an open conference and voted to continue its investigation into Trailer Train Inc.'s request for extension of its existing grant of antitrust immunity to purchase and allocate railroad flatcars. It was on this date that the Commission also adopted a rule and an accompanying administrative ruling simplifying the composite list of exempt and non-exempt agricultural commodities by eliminating redundant information contained in a prior administrative ruling. On May 26, the Commission issued its decision approving the sale of the Burlington Northern Railroad Company's "South Line" to Montana Rail Link. The Commission's approval followed an extensive investigation of the transaction.

On June 6, the Commission issued its finding that the railroad industry's 1987 cost-of-capital rate was 11.6 percent. This was the first cost-of-capital determination to use the Commission's expedited procedures to ensure that a cost-of-capital decision is served by June 30 of the year following that for which a determination is being made.

On June 7, the Commission granted an application proposing the integration of the nation's two largest motor passenger carriers. The GLI Acquisition Company (a subsidiary of the controlling interests of the Greyhound Lines bus system) was authorized to purchase the operating rights and some operating assets of Trailways Lines, Inc. (the dominant member of the National Trailways Bus System). In approving the transaction, the Commission found that the competitive posture of the bus industry would be enhanced by the operation of a unified, national bus system under Greyhound's management, to the benefit of the traveling public.

On June 21, the Commission issued a decision amending its rules to exempt several types of water carrier service and to restore a small-craft exemption that previously had been removed. The Commission thus exempted: (1) the transportation of passengers between places in the United States through a foreign port; (2) all contact carrier vessel leasing; and, (3) the transportation of certain owned property. Also during June, the Commission issued a decision interpreting the scope of the ferry exemption for water carriers.

The Commission also issued in June the results of the survey it had undertaken in March concerning the operations of Guilford Transportation Industries. That survey found prolonged equipment delays, reduced service levels, and indications of shipper dissatisfaction. Subsequent reviews of Guilford's operations showed improvement in service levels and shipper satisfaction.

On July 8, the Commission approved, under its class-exemption rules for non-carrier acquisitions, the creation of the Wisconsin Central, Ltd., the nation's longest regional railroad, with approximately 2,000 miles of track. On that same day, the Commission determined that it held exclusive authority to regulate the State of California's rail freight and passenger service because California had not obtained ICC certification for the regulation of its own intrastate rail traffic.

On July 12, the Commission approved its proposed fiscal year 1990 budget in a conference which was open to the public and, on July 19, the Commission found that none of

the nation's 18 Class I railroads was revenue adequate during 1987, since their individual returns on net investment in transportation property were less than the cost of capital determined for the industry for that year.

In a decision served on July 20, the Commission adopted interim guidelines that accepted trust fund agreements containing certain conditions and invited comments on whether and how other types of security might be structured to be substantially equivalent to surety bonds. On July 27, the Commission heard oral argument on the Santa Fe Southern Pacific Corporation's proposed plan of divestiture of Southern Pacific Transportation Company to Rio Grande Industries, Inc., the parent company of the Denver and Rio Grande Western Railroad Company.

During July, the Commission also considered challenges to a United Parcel Service (UPS) tariff provision that eliminated the transportation of common fireworks. The Commission concluded that UPS's refusal to transport fireworks was made on the basis of inconvenience rather than compelling necessity and found the tariff provision to be unreasonably discriminatory.

On August 4, the Commission granted Amtrak's application to compel the sale of the Boston & Maine Corporation's Connecticut River Line and approved that line's related sale from Amtrak to the Central Vermont Railway. This instance was the first time the Commission had exercised its authority under the Rail Service Passenger Act's forced-sale procedures. On August 9, in an open voting conference, the Commission approved the sale of the Southern Pacific Transportation Company to the Denver and Rio Grande Western Railroad Company and denied an inconsistent application filed by Kansas City Southern Industries, Inc. Because the approved transaction was an end-to-end combination of rail lines, no major anticompetitive effects were anticipated.

After receiving informal criticism regarding the complexity of rail cost-recovery tariffs, the Commission decided on August 12 to solicit and consider the views of the shipping public and tariff publishers regarding the form of publication being utilized for tariffs. The Commission will consider suggestions for rule changes which could lead to an improvement in the manner in which information is conveyed in rail carrier cost-recovery tariffs. On August 17, the Commission issued a decision applying new statutory criteria for authorizing intrastate, regular-route, passenger carrier service, and discussed the required nature and extent of related interstate and intrastate operations.

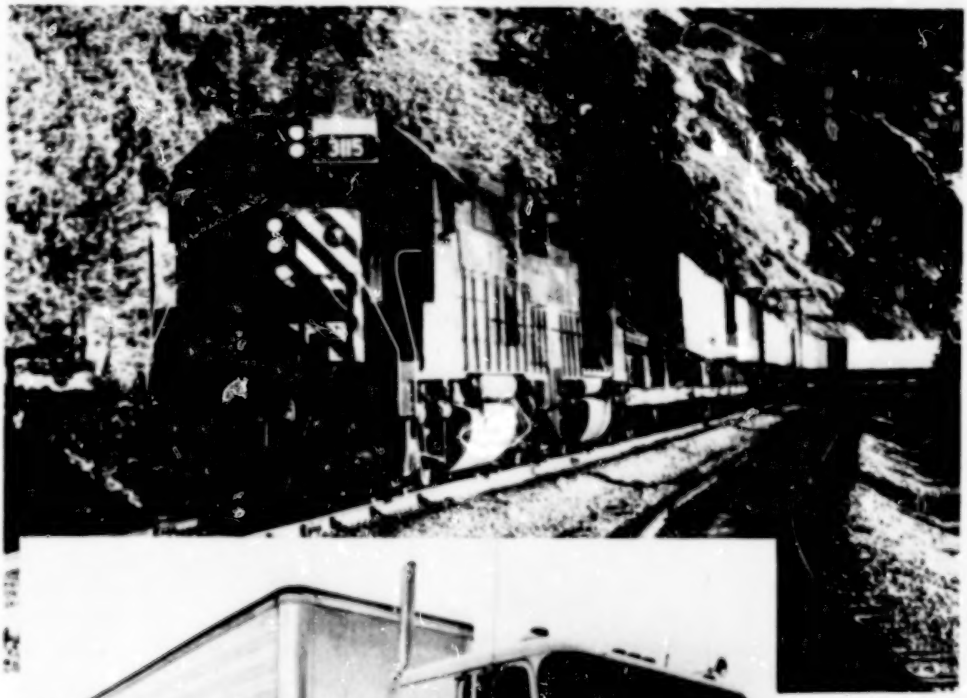
On September 6, the Commission proposed to change the way property taxes are treated in rail abandonment proceedings to allow property taxes to be considered as an avoidable cost only when an actual decrease in a railroad's property tax liability occurs following abandonment. On September 9, the Commission found that the rate cap on the rail transportation of recyclables for 1988 should be set at 147.7 percent of revenue-to-variable costs. The Commission's written decision approving the Southern Pacific divestiture was issued to the public on September 12, and that issuance completed the Commission's precedent-setting schedule for concluding this transaction.

On September 29, the Commission's Office of Transportation Analysis (OTA) made available its 1987 ICC Waybill Sample, a sampl-

ing of all carload waybills for rail traffic terminating in the United States during calendar year 1987. This waybill sample, as well as those developed in prior years, is the only statistically valid source of data for industrywide rail movements. The OTA also made available its Public Use File containing nonconfidential data on 1987 rail traffic flows and patterns. During the past fiscal year, the OTA processed numerous waybill requests from Federal agencies, state transportation agencies, and participants in formal ICC proceedings in accordance with the Commission's waybill data release procedures codified at 49 CFR 1244.8. The OTA also continued to maintain a computerized data base of railroad contract summaries through the entrance of data on nearly 16,000 new contract filings. OTA utilized this data base to respond to numerous Commission and public requests for information. As of September 30, 1988, there were over 76,000 contracts filed with the Commission since passage of the Staggers Rail Act of 1980.

The Commission's Office of Public Assistance (OPA) responded to over 14,750 inquiries regarding matters under the jurisdiction of the ICC last fiscal year. In addition, the OPA provided advice and assistance to numerous parties involved in rail abandonment cases and other Commission proceedings, participated in one oral hearing and one public hearing pertaining to railroad abandonment cases, and participated in two public hearings pertaining to railroad acquisitions.

In fiscal year 1988, six ICC public informational booklets were revised by the OPA to reflect changes in Commission rules and procedures. The Commission's minority- and female-owned motor carrier file was updated, and a new listing was published. The OPA also undertook the publication of a booklet providing guidelines to potential operators for evaluating the viability of small railroad lines.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LEGISLATION

Attempts were made once again during the fiscal year to revise the Staggers Rail Act of 1980. The main proponent of change was a coalition of shippers referred to as CURE, The Consumers United for Rail Equity. On November 5, 1987, the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House of Representatives' Committee on Energy and Commerce marked up its version of the proposed reregulation legislation, originally designated H.R. 1393, and renamed the bill the "Interstate Commerce Commission Reform Act of 1987." No further action was taken in the House. On September 20, 1988, the Senate Committee on Commerce, Science, and Transportation considered a staff draft of an amended version of S.676, titled the "Interstate Commerce Reform Act of 1988," but failed to approve it. No further action was taken on the proposal in the 100th Congress.

Throughout the year, the Commission remained firmly opposed to attempts to revise the Staggers Act by explaining that it had taken administrative actions to adjust its policy to answer criticisms of earlier implementation of the Act.

Hearings and Comments on Legislation

New Short Line and Regional Railroads. The Commission testified on October 1, 1987, before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce, and on October 20, 1987, before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation, regarding the proliferation of new short lines and regional railroads. The Commission's testimony for both hearings contained profiles of new short lines and new regional railroads and described actions taken to expedite the creation of both.

Availability of Railroad Grain Cars. On May 2, 1988, at a hearing held in Kansas City, Missouri, the Commission testified before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce regarding the availability of railroad grain cars. In its testimony, the Commission discussed the effects and goals of the Staggers Act in relation to the movement of grain. The Commission's conclusion was that though the profitability of the railroad industry has definitely improved since Staggers, that profitability has not come at the expense of shippers because they are now better served and prices have generally fallen. In its testimony, the Commission provided answers to a series of questions asked by Subcommittee members regarding current grain car shortages and whether current problems are caused by chronic rail industry difficulties or strong cyclical demand.

Property Brokerage Industry Practices. On November 13, 1987, the Commission testified before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation on the practices of transportation property brokers in the motor carrier industry. The Subcommittee was particularly interested in the Commission's regulation of property brokers, allegations of abuse by brokers and other intermediaries, and the growth of the brokerage industry since 1980.

In its testimony, the Commission described the explosive growth in the number of licensed property brokers since passage of the Motor

Carrier Act of 1980 and pointed out that this was a reflection of the need for innovative transportation middlemen who seek out greater efficiencies and improved service in surface transportation. The Commission acknowledged that the relative newness, rapid growth, and extremely competitive nature of the property broker industry may have led to some problems. The Commission's analysis of the allegedly unlawful practices of property brokers, and its subsequent decisions not to amend its rules governing property brokers, as requested in petitions by Senn Trucking Company,[1] was summarized. The Commission's testimony also reviewed its decisions regarding approaches to meeting property broker security requirements, as well as the complaint handling, compliance, and enforcement activities of the Commission's Office of Compliance and Consumer Assistance in regard to broker activities.

Oversight of the Motor Carrier Industry. On March 16, 1988, the Commission testified before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation at an oversight hearing on the motor carrier industry. The Commission's testimony described how the Motor Carrier Act and other deregulatory legislation had been successful in increasing the number of carriers available to serve shippers, stimulating a variety of new price and service options, promoting the growth of contract carriage, and encouraging more intermodal movements. It also described how a greater reliance on the competitive marketplace to ensure a low-cost, more efficient mix of transportation services has allowed the Commission to eliminate needless regulation and reduce its staff, and how the nation's economy has realized significant savings as a result. The passage of legislation that would further deregulate the motor carrier industry was encouraged, and specific legislative proposals were recommended concerning a clarification of the negotiated rates issue, the elimination of certain annual reporting requirements, and a technical revision to the Surface Freight Forwarder Deregulation Act of 1986.

The Commission additionally responded to the questions of Subcommittee Members concerning the expansion of commercial zones, possible solutions to the negotiated rates issue, the definition of intrastate versus interstate movements, and the proposed streamlining of annual accounting and reporting requirements.

Passenger Bus Transportation. On August 25, 1988, at a hearing held in Omaha, Nebraska, the Commission testified before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science, and Transportation on the subject of passenger bus transportation. In its testimony, the Commission discussed its implementation of the Bus Regulatory Reform Act of 1982, specifically relative to the areas of eased entry, rate flexibility, and exit policy. The GLI Acquisition Company (Greyhound)-Trailways Lines, Inc., merger was also discussed, and the Commission testified that a more competitive environment has been developed, that the bus industry is trying to stem the trend of the decline in service and routes, and that price and service options have increased.

ICC Jurisdiction over Canadian

[1] No. 39962, *Senn Trucking Co.—Lawful Practices of Property Brokers—Petition for Rulemaking*, served June 5, 1987.

Motor Carriers. The Commission sent comment in the form of a letter to the House Committee on Public Works on January 25, 1988, concerning H.R. 2638, a bill "to provide that the Commission may exercise jurisdiction over Canadian motor carriers which provide transportation within commercial zones which straddle the international border between the United States and Canada." The Commission's letter explained that the bill would expand the Commission's regulatory jurisdiction over the trucking industry, increase the workload of the Commission, and create a new conflict regarding United States policy with respect to Mexican and Canadian carriers. The Commission summarized its position by stating that, from an administrative standpoint, the bill presented serious problems that would need to be clarified prior to full House consideration. H.R. 2638 was not enacted by the 100th Congress.

Legislative Recommendations

Elimination of Section 8(b) Food and Grocery Report Requirements. In testimony presented on March 16, 1988, before the House Committee on Public Works and Transportation, the Commission proposed that Congress enact legislation to eliminate an annual reporting requirement that had been mandated by Section 8(b) of the Motor Carrier Act. Section 8(a) of the Act permits sellers of food and grocery products which sell under a uniform zone-delivered price system to reduce the price of their products by an amount that does not exceed the actual transportation cost savings to a seller if purchasers pick up products themselves.

The Commission's report was to contain information on the extent to which cost savings resulting from these newly allowed transportation efficiencies were passed on to consumers. The Commission stated that industry data have demonstrated that customer pickup activity has become a stable and accepted industry practice, and that savings are being passed on to consumers. Widespread mergers and acquisitions in the wholesale and retail grocery industries made it difficult to obtain the quantity and diversity of statistically sound data needed for the Commission report, however, and the Commission concluded that it would be unwise to invest in the development of a new data base to support an annual report on an activity that is no longer perceived to be a problem. Included in Section 9113 of H.R. 5210, the "Anti-Drug Abuse Act of 1988",[2] is a provision removing the Section 8(b) report requirement.

Technical Revisions to the Surface Freight Forwarder Deregulation Act of 1986. The Commission also recommended during the March 16 hearing before the Committee on Public Works and Transportation certain technical changes to the Surface Freight Forwarder Deregulation Act of 1986[3] to eliminate ambiquity regarding freight forwarder cargo liability and the transportation of used household goods. Such technical corrections were also incorporated into Section 911 of H.R. 5210, the "Anti-Drug Abuse Act of 1988."[4]

Reports To Congress

Railroad Accounting Principles Board. As part of the continuing appropriations for fiscal year 1988[5], Congress required the Commission to initiate a regulatory proceeding

[2]Public Law 100-690, November 18, 1988.
[3]Public Law 99-521.
[4]Public Law 100-690, November 18, 1988.
[5]Public Law 100-202.

with respect to implementation of the findings of the Railroad Accounting Principles Board and to report on the status of implementation. The first report was submitted to House and Senate Appropriations Committees on March 29, 1988, and the second on September 27, 1988. These reports outlined the initiatives the Commission had underway at the time, as well as their status.

Comments on a GAO Truck Deregulation Report. On December 31, 1987, the Commission provided to the Subcommittee on Transportation of the Senate Committee on Appropriations comments on an April 1987 General Accounting Office (GAO) report entitled "Trucking Deregulation: Proposed Sunset of ICC's Trucking Regulatory Responsibilities."[6] Each of the eight ancillary motor carrier regulatory functions identified by the GAO were addressed in the Commission's comments. They included (1) safety, (2) insurance, (3) anti-trust enforcement, (4) cargo damage liability, (5) data reporting, (6) owner-operator protections, (7) household goods consumer rules, and (8) Mexican carrier registration. An update of 1985 staff-year data also was provided by the Commission to the GAO.

Inspector General Act Amendments

On October 18, 1988, President Ronald Reagan signed into law S. 908, the "Inspector General Act Amendments of 1988"[7]. This legislation added inspector general offices to many Federal departments and agencies, including the Commission. It required the Commission to establish and maintain an Office of the Inspector General no later than 180 days after enactment and to meet certain reporting requirements similar to those in legislation enacted 10 years earlier.

ICC Sunset Proposal

In the first session of the 100th Congress, at the Administration's request, legislation was introduced to sunset the Interstate Commerce Commission. Late in the second session, H.R. 5384, a bill entitled the "Interstate Commerce Commission Sunset Act of 1988," was introduced and was identical to Title II of S. 711, the "Product Liability Reform Act of 1987." The 100th Congress ended without holding hearings or taking other action on any of the various proposals to sunset the ICC.

[6]Document number RCED 87-107.

[7]Public Law 100-504.

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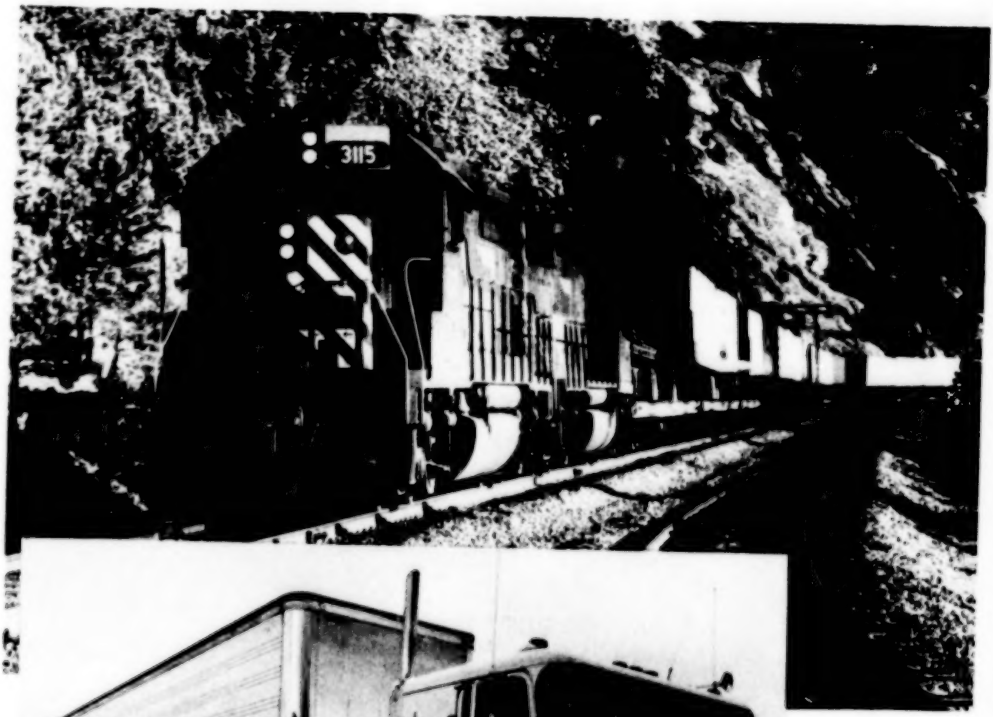
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ADMINISTRATION

Organization and Management

In fiscal year 1988, there were no major changes in the Commission's organizational structure or management as the Commission continued to make efficient use of resources in light of its changing regulatory role. However, in anticipation of enactment of the Inspector General Act Amendments of 1988, Public Law 100-504, the Commission did establish an Office of Internal Audit within the Chairman's office. The Internal Auditor is appointed by, and reports directly to, the Chairman. The Commission's average staff-year employment level stood at 712 for the past fiscal year, a reduction of 20 from the prior fiscal year's average of 732.

Human Relations

During fiscal year 1988, the Office of Human Relations concentrated its efforts on its public-service mandate in the area of equal employment opportunity (EEO) and human resources management. The Human Relations staff conducted seminars to assist managers and supervisors in meeting their EEO objectives, and individually tailored sessions were held with small managerial groups to address relevant issues. In addition, a series of employee seminars was sponsored covering topics such as tax reform and health insurance. The Human Relations staff also presented career-enhancement workshops, targeting employees below the GS-9 level, which provided instruction regarding successful interviewing techniques and Federal career planning.

Commission Budget

The Commission's fiscal year 1990 budget was developed and submitted concurrently to the Office of Management and Budget and the Congress in August 1988. The budget reflected a status quo staffing level to provide continuity of regulatory functions in the absence of the passage of legislation further deregulating the motor carrier industry, and the Commission's streamlined administrative procedures in motor freight, household goods, and railroad matters have further promoted efficient resource use.

Fiscal Year 1988 Appropriations

Commission funding for fiscal year 1988 was included as part of a continuing resolution. Public Law 10-202, approved December 22, 1987, authorized the following continuing appropriations:

- *Salaries and Expenses:* For necessary expenses of the Commission, including services as authorized by 5 U.S.C. 3109, and not to exceed $1,500 for official reception and representation expenses, $44,294,000, provided that joint board members and cooperating state commissioners may use government transportation requests when traveling in connection with their official duties as such.
- *Directed Rail Service:* No funds provided in Public Law 100-202 were to be available for the execution of programs the obligations for which could reasonably be expected to exceed $475,000 for directed rail service authorized under 49 U.S.C. 11125 or any other legislation.

Salaries and Expenses Appropriations

On March 2, 1988, Chairman Heather J. Gradison and staff appeared before the Subcommittee on Transportation of the House Committee on Appropriations to testify on the Commission's fiscal year 1989 budget request. The Chairman

and staff supported the request to the Subcommittee on Transportation of the Senate Committee on Appropriations by responding on May 24, 1988, to a series of written questions in lieu of a hearing.

Payments for Directed Rail Service Appropriations

The last instance of subsidized directed rail service occurred between October 5, 1979, and March 23, 1980, when the Kansas City Terminal Railway Company provided service over the lines of Chicago, Rock Island, and Pacific Railway Company. The Congress last appropriated funds for this directed service in a fiscal year 1982 supplemental appropriation.

Since no new, subsidized directed rail service is anticipated, no funds were requested for fiscal year 1989.

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RAILROADS

General Financial Condition

The revenues, earnings, and traffic volume of the railroad industry's Class I line-haul carriers increased substantially during fiscal year 1988 as the nation's economy continued to strengthen. Commission data for the twelve months ending June 30, 1988, and June 30, 1987, show that operating revenues rose 5.9 percent, to $27.4 billion, and revenue ton-miles of freight increased 10.8 percent. Net railway operating income increased $525.2 million, to almost $1.6 billion, and ordinary income rose $582.8 million, to $1.8 billion. With the exclusion of the large restructuring charges of eight major railroads to record severance pay for employee buyouts and asset write-downs attributable to freight car retirements and line abandonments, net railway operating income rose $532.5 million, to almost $2.4 billion, and ordinary income increased $537.4 million, to almost $2.7 billion. The rate of return on net investment in transportation property increased from 2.92 percent for the twelve months ending June 30, 1987, to 4.38 percent for the same period of 1988. Again, with the exclusion of restructuring charges, the rate of return rose from 5.21 percent to 6.69 percent.

Large restructuring charges were recorded in the twelve months ending June 30, 1988, by the Norfolk Southern Railroad System, the Illinois Central Railroad Company,[1] and CSX Transportation, Inc., and in the prior 12-month period by the [illegible]G; The Atchison, Topeka and Santa Fe Railway Company; the Soo Line Railroad Company; the Southern Pacific Transportation Company; the St. Louis Southwestern Railroad Company; and the Kansas City Southern Railway Company.

During fiscal year 1988, Class I line-haul railroad employment declined 6.1 percent, to a monthly average of 238,430 employees, compared to a monthly average of 253,990 employees during fiscal year 1987. Since passage of the Staggers Rail Act of 1980, industry employment has fallen about 48 percent.

Sizeable traffic volume gains, higher freight rates, benefits resulting from the recent large restructuring programs implemented by certain railroads, and a continued reduction in employment levels have all contributed to the substantial earnings improvement achieved by the Class I railroad industry during fiscal year 1988. Prospects for the industry are favorable as the economy remains strong and the inflation rate remains at modest levels.

Reorganizations

Commission activity concerning railroad reorganizations was limited to the receipt and review of periodic reports emanating from reorganizations that had taken place prior to the Bankruptcy Act.[2] No actions were taken under Section 77 of the Act, which requires that the Commission review and approve railroad reorganizations that were initiated prior to the 1978 amendments to the Act.

Securities

Most securities issued or assumed by railroads have been exempted from regulation. The Commission's class exemption applies to securities issued and obligations assumed by: (1) Class II and Class III rail carriers; (2) a party acquiring a

[1] Formerly the Illinois Central Gulf Railroad Company, which altered its name during the fiscal year.

[2] 11 U.S.C. 206.

rail line under the financial assistance provisions of 49 U.S.C. 10905; and (3) any rail carrier, regardless of size, issuing equipment trust certificates.[3] Under this exemption, no decision or *Federal Register* notice is issued unless a proposal involving securities is opposed. No proposals were opposed last fiscal year.

The issuance of securities and the assumption of obligations by Class I railroads and holding companies are also exempt from 49 U.S.C. 11301, subject to certain notice requirements.[4] These transactions are automatically exempted unless opposition is registered. Nine carriers filed notices and issued securities under the exemption during the year without opposition and only one was opposed.

The Illinois Central Railroad Company (ICR), its parent, IC Industries, Inc. (ICI), and the Illinois Central Transportation Company (ICT) filed a notice for the transfer of all outstanding common stock of ICR from ICI to ICT, and for the distribution of the common stock of ICT to ICI shareholders. The stock transaction was protested and the Commission instituted an investigation.[5] Subsequently, the Commission found that the transaction was not an issuance of securities, which would have subjected the action to Commission jurisdiction, but rather was a transfer of stock between related corporations with a coupled distribution among existing shareholders. Therefore, no notice of exemption was required and the Commission dismissed the proceeding for lack of jurisdiction.[6] Nevertheless, the Commission discussed the impact of the spinoff of the railroad from the holding company and concluded that the newly independent railroad would be viable and would be able to continue providing responsive service to its customers.

Mergers and Consolidations

The Commission received and approved two major restructurings of western railroads. The first involved the Union Pacific Railroad's (UP) acquisition of the Missouri-Kansas-Texas Railroad Company, a small Class I railroad operating north-south between Kansas City and St. Louis, Missouri; Omaha, Nebraska, on the north; and the Gulf of Mexico on the South.[7] This combination will reduce transportation costs and improve service to shippers through more efficient use of equipment and personnel, and though the consolidation of facilities at common points, particularly at St. Louis, where one yard will be closed, and at Kansas City; Fort Worth, Texas; Muskogee, Oklahoma; and other points in Texas and Oklahoma.

In approving this acquisition, the Commission also approved four of five requested line abandonment applications, six notices of exempt abandonments of line that had been out of service for two or more years, and a petition to exempt an abandonment. Several responsive applications were granted to ameliorate certain adverse impacts on competition for grain originating in the area north and west of Kansas City, for traffic moving over Texas City Terminal Railroad (TCT), and for aggregates from certain Texas points to Houston. The Commission (1) re-

[3] 49 CFR 1175.1
[4] 49 CFR 1175.2
[5] Finance Docket No. 31231, *IC Industries, Inc. et al.—Securities Notice of Exemption Under 49 CFR 1175* (not printed), served March 14, 1988.
[6] *Ibid.* served September 30, 1988.
[7] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control—Missouri-Kansas-Texas Railroad Company, et al.*, 4 I.C.C.2d 409 (1988).

quired UP to negotiate a trackage rights agreement with either The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), Southern Pacific Transportation Company (SPTC), or The Kansas City Southern Railway Company (KCS) to alleviate any adverse effects on grain movements;[8] (2) authorized Santa Fe's purchase of a one-sixth interest in TCT to maintain equal ownership of that railroad with UP; and (3) approved a settlement agreement on aggregates negotiated by UP and SPT as conditions to the primary transaction. Labor-protective conditions were imposed on UP's primary applications, on all abandonments, and also on SPT's responsive application. Conditions enabling the Commission to monitor the post-merger effectiveness of the interchange at Herington, Kansas, of the Denver & Rio Grande Western Railroad Company (DRGW) were also imposed. Other responsive applications were denied.

The second and more important merger answered the question of who would own the SPTC, which included the Southern Pacific Railroad, following the Commission's decision last year denying a proposal to merge SPTC with the Santa Fe. That denial left the issue open and required Santa Fe's parent, Santa Fe Southern Pacific Corporation (SFSP), to divest itself of either the Santa Fe or SPTC.[9] In a voting conference held within the precedent-setting, 180-day deadline that the Commission had imposed on itself for processing the merger application, the Commission unanimously approved the application of Rio Grande Industries, Inc. (RGI) to acquire SPTC. The Commission denied a competing application to acquire SPTC filed by Kansas City Southern Industries, Inc. (KCSI), the parent of the KCS.

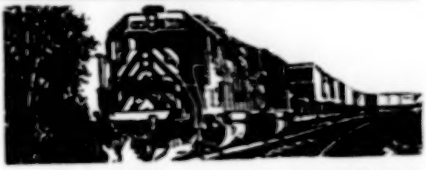
The SFSP had solicited bids from interested parties and had accepted a proposal by RGI and its wholly owned subsidiaries, SPTC Holding, Inc. (SPHI) and the DRGW, to acquire and exercise control over SPTC and its carrier subsidiaries. KCSI, through its wholly owned firm, the Southern Pacific Acquisition Company (SPAC), had filed a separate and inconsistent application to acquire SPT and its subsidiaries. It proposed to combine SPT's operations with KCSI's railroads, the KCS, and the Louisiana and Arkansas Railway Company. The primary application was approved, subject to labor-protective conditions, and KCSI's inconsistent application, along with responsive applications for protective conditions sought by the Union Pacific Railroad Company and the Missouri Pacific Railroad Company (UP/MP), were denied.[10]

RGI's acquisition of SPTC will provide substantial public benefits, including improved, more efficient single-line service for shippers in both the Central and Southern Corridors, a strengthened competive alternative to the UP/MP system in the Central Corridor, and the ability to alleviate congestion and overcapacity in the Southern Corridor. Redundant operating facilities will be eliminated, and both railroads anticipate a reversal of market share losses once they are fully consolidated under common manage-

[8] An agreement between UP and KCS was approved in Finance Docket No. 30800, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control—Missouri-Kansas-Texas Railroad Company, et al.* (not printed), served August 11, 1988.

[9] *Santa Fe Southern Pacific Corp.—Control—SPT Co.*, 2 I.C.C.2d 709 (1986), *aff'd* 3 I.C.C.2d 926 (1987).

[10] Finance Docket No. 32000, et al. *Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Company—Control—Southern Pacific Transportation Company*, 4 I.C.C.2d 834 (1988).



ment. Because this was substantially an end-to-end merger, adverse competitive effects will be few, if any.

Because KCS's ability to consummate the transaction in an expeditious manner was uncertain, its application was denied. The Commission expressed the concern that its approval of KCS's proposal could have unnecessarily prolonged the SPT Trusteeship, with possible adverse affects on SPT's service, operations, and market share.

The UP/MP had sought conditions to give it the right to quote through rates for SPTC Central Corridor traffic and for DRGW/SPTC to haul the traffic for UP/MP at fully allocated costs. These conditions were denied because the Commission found that UP/MP already presents a strong competitive constraint on SPTC Central Corridor traffic, and because the consolidation was not seen as leading to a creation of a DRGW Central Corridor monopoly.

In the South, the Illinois Central Railroad Company (ICR) continued its line sales program, which has reduced its system mileage from approximately 9,600 miles to approximately 3,000, with the sale of almost 200 miles of track from Haleyville, Alabama to Fulton, Kentucky to the Southern Railway Company, which acquired both the track and an additional 154 miles of bridge trackage rights from Fulton to Centralia, Illinois. That application was accepted and processed as a "significant" transaction.[11] ICR also had filed a request to discontinue trackage rights over both the Southern Railway and the Burlington Northern Railroad Company between Haleyville and Birmingham, Alabama. These applications were approved subject to employee-protective conditions.[12]

Two other formal acquisition applications were filed to purchase line segments of CSX Transportation, Inc. The Commission accepted as a "minor" transaction The Huron and Eastern Railway Company, Inc.'s proposed acquisition of a 58.5-mile line between Bad Axe and Saginaw, Michigan.[13] The Commission's acceptance of a second application, the Tennessee Southern Railroad Company's proposal to acquire, through purchase and lease, approximately 118 miles of track in three areas of Tennessee, remained pending at the close of the fiscal year.[14]

The Commission also approved revisions to its formula for determining trackage rights compensation resulting from a UP/MP and Western Pacific Railroad Company consolidation, which was conditioned on the most extensive trackage rights ever granted by the Commission.[15] The DRGW was granted trackage rights between Pueblo, Colorado, and Kansas City, Missouri, and SPTC was granted trackage rights between Kansas City and St. Louis. Because these parties could not agree to the terms for compensa-

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[11] See 49 CFR Part 1180.

[12] Finance Docket No. 31088, *Southern Railway Company and Norfolk Southern Corporation—Purchase—Illinois Central Railroad Company Line Between Fulton, KY and Haleyville, AL—And Trackage Rights—Illinois Central Railroad Company Line Between Fulton, KY and Centralia, IL*, and Docket No. AB-43 (Sub.-No. 148X), *Illinois Central Railroad Company—Exemption—Discontinuance of Trackage Rights between Haleyville and Birmingham, AL* (not printed), served May 18, 1988.

[13] Finance Docket No. 31316, *The Huron and Eastern Railway Company, Inc.—Acquisition—CSX Transportation, Inc. Line Between Bad Axe and Saginaw, MI* (not printed), served September 29, 1988.

[14] Finance Docket No. 31329, *Tennessee Southern Railroad Company, Inc.—Purchase And Lease—CSX Transportation, Inc.*

[15] *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982) *Aff'd in part sub nom. Southern Pacific Transpl. Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984).

tion, the Commission was asked to set them. In a major decision determining net income and interest-rental elements of a compensation formula, the Commission set the basis for determining a final rental value that would equalize the competitive positions of the owning and renting carriers.[16]

The Commission granted the Consolidated Rail Corporation's (Conrail) proposal to reopen[17] a 1922 proceeding to remove 17 conditions imposed upon the New York Central Railroad Company's acquisition of control of Chicago River & Indiana Railroad Company, and of Chicago Junction Railway.[18] The conditions were designed to ensure the neutrality of the acquired carriers' terminal switching services performed for line-haul carriers, and to ensure that line-haul carriers operate livestock trains over the Chicago Junction lines.

The Commission's class-exemption procedures expedited the handling and consideration of numerous financial transactions last fiscal year, including exemptions for one interrail acquisition,[19] one lease,[20] 17 control or acquisition proposals for nonconnecting Class II or Class III carriers,[21] four proposals for the relocation of rail lines[22], and 19 trackage rights transactions.[23]

In one of these trackage rights proposals, the Burlington Northern Railroad Company (BN) negotiated trackage rights with its subsidiary, the Winona Bridge Railway Company (WB), to conduct bridge movements from Seattle, Washington, to Winona Junction, Wisconsin, a distance of 1,860 miles.[24] Just before operations were scheduled to begin, the Commission's exemption approval was stayed by a U.S. Court of Appeals,[25] but that stay was subsequently lifted.[26] However, a U.S. District Court enjoined BN from initiating operations with WB until BN has exhausted the mandatory collective-bargaining provisions of the Railway Labor Act.[27]

The Commission also processed 12 notices under its class exemption for transactions within a

[16] *St. Louis Southwestern Ry. Co. Compensation—Trackage Rights*, 4 I.C.C.2d 668 (1987).

[17] Finance Docket No. 1165 (Sub-No. 1), *Chicago Junction Case* (not printed), served August 18, 1988.

[18] *Chicago Junction Case*, 71 I.C.C. 631 (1922).

[19] See 49 CFR 1180.2(d)(1); see, e.g., Finance Docket No. 31272, *CSX Transportation, Inc.—Acquisition Exemption—Certain Line of Norfolk and Western Railway Company* (not printed), served May 20, 1988.

[20] See 49 CFR 1180.2(d)(4); see, e.g., Finance Docket No. 31239, *Norfolk and Western Railway Company and Wabash Railroad Company—Renewal of Lease Exemption* (not printed), served April 13, 1988. For substantial lease changes other than time extensions or revenue changes, a formal application or individual petition for exemption must be filed as in Finance Docket No. 21666 (Sub-No. 10), *The Cincinnati, New Orleans and Texas Pacific Railway Company—Ex-Mod. of Leases—Cincinnati Southern Railway* (not printed), served November 13, 1987.

[21] See 49 CFR 1180.2(d)(1); see, e.g., Finance Docket No. 31058, *Mendocino Coast Railway, Inc.—Acquisition Exemption—Assets of California Western Railroad* (in decisions not printed), served June 22 and July 20, 1988, and Finance Docket No. 31298, *Chicago West Pullman Transportation Corporation—Continuation in Control Exemption—Georgia Woodlands Railroad Company* (not printed), served July 25, 1988.

[22] See 49 CFR 1180.2(d)(5); see, e.g., Finance Docket No. 30875, *The Denver and Rio Grande Western Railroad Company—Exemption—Relocation over Burlington Northern Railroad Company* (not printed), served November 1, 1987 (vacated in part in *Denver & R.G.W.E. Co.—Jt. Proj.—Relocation Over BN*, 4 I.C.C.2d 95 (1987)).

[23] See 49 CFR 1180.2(d)(7); see, e.g., Finance Docket No. 31209, *The Indiana Railroad Company—Exemption—Trackage Rights—Illinois Central Gulf Railway Company* (not printed), served March 17, 1988.

[24] Finance Docket No. 31163, *Winona Bridge Railway Company—Trackage Rights—Burlington Northern Railroad Company (in decisions not printed)*, served December 4, 1987, January 7 and March 7, 1988.

[25] *M.M. Winter* v. *Interstate Commerce Commission et al.* (unpublished) No. 88-1250 (8th Cir. April 15, 1988).

[26] *M.M. Winter* v. *Interstate Commerce Commission et al.* (unpublished) No. 88-1250 (8th Cir. May 13, 1988).

[27] *Burlington Northern R.R., Co.* v. *United Transportation Union*, (unpublished) No. 88-C-2687 (N.D. Ill June 13, 1988).

corporate family that do not affect service or competition.[28] Among these were several notices from four wholly owned rail carrier subsidiaries of Guilford Transportation Industries (GTI) proposing to transfer operations to a fifth carrier subsidiary, the Springfield Terminal Railway Company. The Commission instituted an investigation and found that, collectively, the transactions had had a substantial adverse affect on GTI's employees. As discussed in the "Rail Labor Issues" section of this chapter, the Commission imposed extraordinary labor-protective conditions.[29] One related exemption was found to involve transactions outside Commission jurisdiction.[30]

According to a statutory exemption for consolidations, mergers, and acquisitions of control,[31] 10 petitions to exempt interrailroad control proposals were processed. Of these, only three were opposed, one for problems resulting from intercarrier ownership and operating contracts,[32] one over questions of the degree of common control between affiliated carriers,[33] and one related to the National Rail Passenger Corporation's (Amtrak) acquisition of the Connecticut River Line.[34]

With the recent proliferation of short line and regional railroads, the demand for experienced railroad personnel has substantially increased. In many instances, new carriers gain this expertise through the knowledge and experience of officers and directors who already have positions with existing carriers. However, prior to an officer or director's acceptance of an additional position with another carrier, Commission approval is required.[35] To facilitate these transactions, the Commission granted a class exemption for officers or directors to accept additional positions with other carriers, except between Class I carriers.[36] Under the Commission's exemption authority, the Commission retains the right to review any of these transactions, upon complaint.

Acquisition, Operation, and Construction

Fiscal year 1988 saw an abrupt curtailment of the acquisition and operation, often by local entrepreneurs, of rail lines by new short line and regional railroads. Two decisions by the U.S. Court of Appeals for the Third Circuit[37], discussed in the "Rail Labor Issues" section of this chapter, held that the Interstate Commerce Act's labor provisions were subordinate to those of the Norris LaGuardia Act[38] and the

[28]See 49 CFR 1180.2(d)(3); see e.g., Finance Docket No. 31192, *Union Pacific Railroad Company—Merger Exemption—Oregon Short Line Railroad Company, Des Chutes Railroad Company, Los Angeles & Salt Lake Railroad Company and Spokane International Railroad Company* (not printed), served January 15, 1988.

[29]*D&H Ry—Lease & Trackage Rights Exempt. Springfield Term.* 4 I.C.C.2d 322 (1988).

[30]Finance Docket No. 31180, *Guilford Transportation Industries, Inc. and Boston and Maine Corporation—Continuance in Control Exemption—Northern Railroad* (not printed), served June 3, 1988.

[31]49 U.S.C. 11343(e).

[32]Finance Docket No. 31148, *Indiana Harbor Belt Railroad Company—Acquisition of Line of Chicago and Western Indiana Railroad Company—Exemption from 49 U.S.C. 11343* (not printed), served January 27, 1988, *aff'd* in a decision not printed and served September 22, 1988.

[33]Finance Docket No. 31262, *International Paper Company—Exemption—49 U.S.C. 11343* (not printed), served June 8, 1988.

[34]See the "Passenger Service" section of this chapter for a discussion of this proceeding.

[35]See 49 U.S.C. 11322(a).

[36]Ex Parte No. 474, *Exemption From 49 U.S.C. 11322(a) For Certain Interlocking Directorates* (not printed), served April 13, 1988.

[37]*RLEA* v. *Pittsburgh and Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), and *RLEA* v. *Pittsburgh and Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988).

[38]29 U.S.C. 108.

Railway Labor Act.[39] As mentioned below under the topic of "Abandonments," the cessation of many short line sales has resulted in a marked increase in both the number of requests to abandon rail lines and the miles of line granted for abandonment. Prior to the Third Circuit's decision on April 8, 1988, the Commission received 39 notices of exemption totaling 2,312.2 miles under its class exemption from Section 10901 of the Interstate Commerce Act.[40] However, from the date of that decision until the end of the fiscal year only 18 notices involving 548.6 miles of track were received.

The Commission acted during the year to address areas of concern over its rules governing the acquisition and operation of short lines, and explained the criteria it would use in exercising its discretion to impose labor-protective conditions in acquisition proceedings (See "Rail Labor Issues", below.)

The FRVR Corporation (FRVR), a noncarrier, and the Chicago North Western Transportation Company (CNW) filed a notice of exemption for FRVR to acquire and operate CNW's "Duck Creek South" lines between Green Bay and Milwaukee, Wisconsin. At the request of FRVR and CNW, the Commission instituted a declaratory order proceeding to clarify its jurisdiction over labor issues arising out of the foundation of FRVR and other short line railroads. The Commission found that, to the extent necessary, the Railway Labor Act is preempted by the Interstate Commerce Act to permit parties to consummate transactions the Commission has previously authorized under or exempted from 49 U.S.C. 10901.[41] Discovery was still underway in outstanding petitions to revoke the exemption at the end of the fiscal year.

The Commission also modified its class exemption procedures during the year.[42] The revised rules, applicable to transactions creating new Class I or Class II railroads, expand the previous seven-day notice to a new, 35-day, two-stage notice period to provide more opportunity for public comment. The two-stage process requires a 14-day pre-filing notice to interested parties and a 21-day, post-filing period to consider supporting or opposing arguments before an exemption becomes effective. The latter, 21-day period is divided into three segments to allow seven days for the filing of petitions for stay, seven days for the filing of replies, and seven days for the Commission's review and action. Applicants must also provide more information concerning the anticipated effects on service and labor. The rules for acquisitions of new Class III carriers at 49 CFR 1150.31 were not changed.

Of the 148 transactions processed since the class exemption for acquisitions and operations under 49 U.S.C. 10901 became effective on February 17, 1986,[43] only 24 have been formally protested.

Before the Third Circuit's decision in *RLEA* v. *Pittsburgh and Lake Erie*,[44] the Commission conducted extensive, multistage inquiries in

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[39] 45 U.S.C. 151.

[40] Ex Parte No. 392 (Sub-No. 1), *Class Exemption—Acq. and Oper. of R. lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[41] Finance Docket No. 31205, *FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company* (not printed), served January 29, 1988.

[42] *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 4 I.C.C.2d 305.

[43] See *Class Exemption for Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986).

[44] See Footnote 37, *supra*.

proceedings where the class exemption was invoked to create significant new regional railroads. One of these was the Commission's decision in the *Pittsburgh and Lake Erie Railroad* case[45] itself, where the Commission denied a stay request but required a seller to maintain its corporate existence until petitions to revoke were considered. This would have allowed the Commission to revoke the exemption and cancel the sale, if warranted. The Commission's decision on a petition for reconsideration has been held in abeyance because of court litigation regarding the sale.

The Commission also conducted an in-depth investigation into the Burlington Northern Railroad's (BN) sale of its "South Line", stretching 831 miles across part of Idaho and Montana, to a new carrier, Montana Rail Link (MRL). This investigation included the Commission's dispatch of an Administrative Law Judge to Missoula, Mont., to hear testimony from the public. According to several Commission decisions,[46] the Montana Public Service Commission (MPSC) and other parties were authorized to conduct discovery on MRL and BN, and an extensive record was developed. The Commission denied petitions seeking revocation of the exemption,[47] and the Montana Department of Public Service Regulation and the MPSC subsequently sought reopening and reconsideration based on new evidence. The Commission was considering that reopening and reconsideration request at the end of the fiscal year.

In a case concerning the creation of the longest regional railroad ever under the Commission class-exemption provisions—involving approximately 2,000 miles of track stretching across Wisconsin, Minnesota, and Illinois—the Commission had initially stayed an exemption and had sought public comment.[48] At the request of many affected parties, including shippers, the Commission vacated that stay[49] and later in the fiscal year approved the Wisconsin Central Ltd.'s (WCL) acquisition and operation of Soo Line Railroad Company lines following WCL's voluntary submission of extensive evidence and substantial public and private support.[50]

The Commission also made two significant rulings regarding the construction of rail lines. In a proceeding concerning a joint relocation project between Denver and Rio Grande Western Railroad Company (DRGW) and the Burlington Northern Railroad Company, the Commission found that, in the absence of adverse effects on shippers, service, competition, or any other transportation interest, the relocation of two short segments of connecting track by DRGW did not require the Commission's prior approval nor exemption.[51]

The Commission additionally exempted the Louisville & Jefferson County Riverport Authority's (Riverport) proposed construction and operation of 6.7 miles of rail line. The proposal was for the connection of a CSX Transportation, Inc. (CSX) main line with the Riverport

[45] *Ibid.*

[46] Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company* (in decisions not printed), served October 22, 30, November 27, December 7, 1987, and May 26, 1988.

[47] *Ibid.*, decision served May 26, 1988.

[48] Finance Docket No. 31102, *Wisconsin Central Ltd.—Exemption, Acquisition and Operation—Certain Lines of Soo Line Railroad Company* (not printed), served September 11, 1987.

[49] *Ibid.*

[50] *Ibid.*, served July 28, 1988.

[51] *Denver & R.G.W.R. Co.—Jt. Proj.—Relocation Over BN*, 4 I.C.C.2d 95 (1987)

Industrial Facility located near Louisville, Kentucky.[52] The proposed track construction contemplated the crossing of tracks belonging to the Paducah & Louisville Railway, Inc. (P&L), which opposed the crossing. Riverport filed a petition to invoke the Commissions authority under 49 U.S.C. 10901(d) to require P&L to allow the proposed construction to cross its tracks. P&L argued in response that the Commission could not act on Riverport's petition under Section 10901(d) unless Riverport filed (and the Commission granted) a formal application under Section 10901, as opposed to Riverport's original petition for exemption from Section 10901 under Section 10505. The Commission found that Riverport had already demonstrated that the project was in the public interest within the meaning of Section 10901(d) and summarily issued a certificate of public convenience and necessity, ordered the crossing, but declined to set compensation until the parties have had an opportunity to negotiate an agreement among themselves.[53] P&L has sought judicial review of the Commission's decision.[54]

Rates and Practices

The Commission continued to reduce its backlog of rate reasonableness cases during the past fiscal year. The centerpiece of the Commission's initiative was the application of its simplified standards and procedures for complaints filed against rates for commodities except coal. The Commission proposed two alternative methodologies for determining rate reasonableness for non-coal movements: the formula replacement cost (FRC) method, and the revenue-to-variable-cost ratio (R/VC) method.[55] Both methodologies simplify rate reasonableness proceedings when small shipments and/or multiple origins and destinations are involved and the application of the complex constrained market pricing (CMP) analysis used for high-volume coal shippers is not justified.[56]

The Commission applied its non-coal rate guidelines in a case involving the movement of empty, retired railroad cars moving on their own wheels to salvage facilities.[57] The Commission had previously announced a tentative decision to apply the FRC methodology in a decision issued last fiscal year.[58] but, based on further analysis, the Commission decided to apply the R/VC method instead. The Commission concluded that FRC was simply a new version of fully allocated cost pricing, an approach to determining rate reasonableness that had previously been rejected because of its failure to take demand considerations into account. The Commission had determined earlier on that demand-based pricing furthers the public interest by allowing for the more efficient allocation of resources and the achievement of revenue adequacy.

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[52]Finance Docket No. 31136, *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc.—Construction and Operation Exemption—In Jefferson County, KY* (not printed), served December 22, 1987.

[53]Finance Docket No. 31136, *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc.—Construction and Operation Exemption—In Jefferson County, KY*, and Finance Docket No. 31136 (Sub-No. 1), *Louisville & Jefferson County Riverport Authority—Petition Under 49 U.S.C. 10901(d)*, 4 I.C.C.2d 249 (1988).

[54]*Paducah & Louisville Railway, Inc.* v. *ICC*, No. 88-1609 (D.C. Cir., filed Aug. 16, 1988).

[55]Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings* (not printed), served April 8, 1987.

[56]See *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) *aff'd Consolidated Rail Corp.* v. *U.S.*, 812 F.2d 1444 (3rd Cir. 1987).

[57]No. 40073, *South-West Railroad Car Parts Company* v. *Missouri Pacific Railroad Company* (not printed), served March 10, 1988.

[58]*Ibid.*, served July 10, 1987.

The R/VC methodology compares the rates at issue with rates on similar traffic that can be presumed reasonable. In effect, it uses demand-based pricing by relying on comparable, market-established rates to set the parameters of rate reasonableness. A final rate reasonableness determination was pending at the close of the fiscal year.

The Commission also applied its non-coal rate guidelines in the *McCarty Farms* group of cases,[59] in which tentative rate unreasonableness findings had been made in another, prior decision.[60] Using the R/VC method, the Commission found that rates on wheat and barley moving from Montana to the Pacific Northwest were unreasonably high relative to the rates on comparable movements in the west. Reparations were ordered and the Burlington Northern Railroad Company was directed to establish a rate structure that would produce an average R/VC no greater than an average R/VC for a comparable group. Subject to this limitation, the railroad was given discretion to use cost-based pricing flexibility.

The Commission made a significant step forward in resolving a long-standing case when it determined that certain carriers possessed market dominance over specific rail traffic and announced that it would use the R/VC method to determine maximum rate reasonableness.[61] Market dominance, a form of monopoly power, exists when a rail carrier's rates are not constrained by intermodal, intramodal, product, or geographic competition.[62] Only when these market forces are absent does the Commission have jurisdiction to consider the maximum reasonableness of a rail rate.[63] In the case at issue, the Commission found that a shipper had not shown a lack of intermodal (truck) competition for its corn syrup traffic moving in carloads from Texas to Arizona. Relative to California destinations, however, the Commission found that the shipper had no effective alternatives and was, therefore, captive.

In another case involving the same shipper, the Commission found effective intramodal or geographic competition for the shipper's sugar traffic between 14 of 78 origin-destination pairs involved and found market dominance with respect to the remainder.[64] Here, also, the Commission announced that it would use the R/VC method in the maximum rate reasonableness phase of the proceeding.

In a case involving single-car movements of heavy electrical machinery, the Commission found various rail carrier defendants market dominant at six of eight involved origins.[65] The Commission found effective intramodal competition at the two remaining origins, but noted that this could be reversed on appeal if the case's complainant could demonstrate the existence of a "bottleneck" connecting carrier. In addition, the Commission tentative-

[59] *McCarty Farms, et al.* v. *Burlington Northern, Inc.* 4 I.C.C.2d 262 (1988) *aff'd* No. 37809, *McCarty Farms, Inc., et al.* v. *Burlington Northern, Inc.* (not printed), served May 11, 1988.

[60] *McCarty Farms et al.* v. *Burlington Northern, Inc.*, 3 I.C.C.2d 822 (1988).

[61] No. 37478, *Amstar Corporatioin* v. *The Atchison, Topeka and Santa Fe Railway Company* (not printed), served December 8, 1987, *aff'd* in an unprinted decision served March 17, 1988.

[62] *Market Dominance Determinations*, 365 I.C.C. 118 (1981), *aff'd sub nom. Western Coal Traffic League* v. *ICC*, 719 F.2d 772 (5th Cir. 1983), *cert. den.* 104 S.Ct. 2160 (1984).

[63] See 49 U.S.C. 10701a and 10709.

[64] No. 38239S, *Amstar Corporation* v. *The Alabama Great Southern R.R.* (not printed), served December 2, 1987, *aff'd* in a decision not printed and served May 16, 1988.

[65] No. 38188S, *Westinghouse Electric Corporation* v. *The Alton and Southern Railway Company* (not printed), served February 9, 1988.

ly concluded under the R/VC method that the rates at issue were not unreasonable and invited comments from involved parties in this regard. The proceeding was subsequently dismissed at the complainant's request.

A complaint in another proceeding which challenged the rate assessed on a single movement of oversized electrical equipment had been held in abeyance during the year at the request of the parties, pending the issuance of final rate guidelines for non-coal traffic. This case was dismissed when the parties negotiated a settlement.[66]

Two cases involving coal rates were dismissed when initial decisions by Administrative Law Judges respectively found the defendant rail carriers not market dominant,[67] and rates charged a captive shipper not unreasonable.[68] Appeals of right are pending.

The trend toward the settlement of rate complaints that was precipitated by the Commission's promulgation of maximum rate reasonableness standards has continued. Five more rate complaints, two involving coal rates, were dismissed when the parties involved reached settlements.[69] The Commission denied[70] as redundant a motion by parties to dismiss an administratively final case,[71] and dismissed as moot a case that had been held in inactive status for years following the completion of a related court action.[72] In another area, a cease-and-desist order rendered in 1979 to prevent discrimination against a connecting carrier was vacated[73] when the Commission found that this prior order no longer served an essential purpose and could inhibit contract ratemaking, the development of through route and joint-rate arrangements, and other procompetitive carrier activities.

Overall, there has been a steady decline in the number of rate complaints brought to the Commission. Indeed, only one rate reasonableness complaint was filed with the Commission in fiscal year 1988.[74] This reduction in the Commission's rate caseload may in large measure be attributable to the continued popularity of negotiated rail transportation contracts[75] and a correspondingly reduced reliance on traditional common carrier tariffs. In effect, negotiation has supplanted litigation in dispute resolution. This fiscal year, 15,980 new rail transportation contracts were filed representing a slight

[66] No. 37010, *General Electric Company* v. *Delaware and Hudson Railway Company* (not printed), served October 29, 1987.

[67] No. 38301S (Sub-No. 1), *Westmoreland Coal Sales Company* v. *Denver and Rio Grande Western Railroad Company, et al.* (not printed), served September 26, 1988.

[68] No. 37931, *Metropolitan Edison Company* v. *Conrail, et al.* (not printed), served July 27, 1988.

[69] No. 37854S, *Consumers Power Company* v. *Norfolk and Western Railway Company* (not printed), served January 11, 1988; No. 37925S, *Department of Defense* v. *Seaboard System Railroad* (not printed), served February 18, 1988; No. 38056S, *Indianapolis Power and Light Co.* v. *Consolidated Rail Corporation* (not printed, served November 12, 1987; No. 38125S, *General Electric Company* v. *The Baltimore and Ohio Railroad Company* (not printed), served December 7, 1987; and No. 38412, *Allied Chemical Corp. et al.* v. *Ann Arbor R.R. Syst., et al.* (not printed), served August 22, 1988.

[70] No. 38783, *Omaha Public Power District* v. *Burlington Northern Railroad Company* (not printed), served February 29, 1988.

[71] *Ibid.* at 3 I.C.C.2d 123 (1986), *aff'd* 3 I.C.C.2d 853 (1987).

[72] No. 38638, *Cleveland Cliffs Iron Co.* v. *Chicago and North Western Transportation Company* (not printed), served February 17, 1988.

[73] No. 35940, *In the Matter of Investigation into the Lawfulness of Interchange Arrangements Between the Bangor and Aroostook Railroad and CP Rail at Brownville Junction, Maine* (not printed), served February 2, 1988.

[74] No.41095, *General Electric Company* v. *The Atchison, Topeka and Santa Fe Ry. Co. et al.*, filed September 23, 1988. The complaint challenges the applicability of tariff charges assessed by the carrier, and, in the alternative, their reasonableness.

[75] 49 U.S.C. 10713.

decrease over the previous fiscal year and primarily attributable to a 30-percent reduction in the filing of grain transportation contracts. This decline in grain contracts filing may have resulted in part from the Commission's adoption of final rules that increased the disclosure requirements applicable to agricultural traffic.[76] These rules implemented legislative changes enacted in 1986.[77]

Another reason for the decline in grain contract filings may have been the increased demand for grain cars, fueled in part by heavier exports and reduced barge capacity on the Mississippi River during the 1988 drought. One carrier has offered premium rate transportation contracts with car guarantees, and another plans to establish an advanced car-ordering system with two-way penalties for cars not used by a shipper or not delivered by a carrier. Finally, a carrier has introduced a system of transportation "futures," or negotiable Certificates of Transportation (COT). Originally, these COTs guaranteed corn and soybean shippers tariff rate service in 54-car unit trains at a specific future date. As revamped, the COTs program was expanded to include wheat and barley and to apply to single-car and 26-car shipments, as well. The lawfulness of this program is the subject of a pending complaint proceeding.[78]

As contract rules have become more refined, resort to the Commission for the resolution of contract-related matters has also diminished. For example, in fiscal year 1985 the Commission received 142 requests for exemptions to allow carriers to pay reparations or waive undercharges on pre-contract tariff movements. In all of fiscal year 1988, the Commission received only three exemption petitions,[79] and these were for movements that did not meet the technical requirements of the class exemption adopted in fiscal year 1986.[80] All were unopposed and granted. The Commission's final contract rules added a similar class exemption for contract amendments.[81] The Commission dismissed two petitions to exempt the payment of reparations for movements billed at tariff rates when these movements inadvertently fell outside the terms of an existing contract.[82] The Commission concluded that the parties involved need only amend their contract to reflect their intent that it apply to nonconforming movements.

The Commission also denied a petition to establish rules for the complete disclosure of long-term coal transportation contracts.[83] The Commission found that the information needed to negotiate contracts is already available to shippers and carriers and that confidentiality

[76] *Railroad Transportation Contracts*, 4 I.C.C.2d 228 (1988).

[77] P.L. 99-509. Interim rules had been adopted at 3 I.C.C.2d 219 (1986).

[78] No. 40169, *National Grain and Feed Ass'n v. Burlington Northern Railroad*, filed March 8, 1988.

[79] No. 40160, *The Norfolk and Western Railway Company—Exemption—Payment of Reparations* (not printed, served January 25, 1988; No. 40161, *The Norfolk and Western Railway Company and Indiana Harbor Belt Railroad Company—Exemption—To Waive Undercharges* (not printed), served January 26, 1988; and No. 40185, *The Norfolk and Western Railway Company—Exemption—Payment of Reparations and Waiver of Undercharges* (not printed), served July 19, 1988.

[80] *Exempt.—Shipments Subject to a Contract Rate*, 1 I.C.C.2d 966 (1985).

[81] See 49 CFR 1313.3(c)

[82] No. 40148, *Norfolk and Western Railway Company—Exemption—To Pay Reparations* (not printed), served July 7, 1988; and No. 40156, *Norfolk and Western Railway Company—Exemption—to Pay Reparations* (not printed), served July 7, 1988.

[83] Ex Parte No. 387 (Sub.-No. 961), *Petition to Disclose Long Term Rail Coal Contracts* (not printed), served July 20, 1988.

benefits the public interest by encouraging competitive rate reductions, deterring the formation of price-leadership cartels, and allowing differential pricing.

The Commission updated its annual determination of railroad revenue adequacy in July 1988,[84] and found that none of the nation's 18 Class I railroads were revenue adequate in 1987. Under the Commission's standard, a railroad is considered revenue adequate if its rate of return on investment is at least equal to the industry's current cost-of-capital rate. None of the railroads achieved a return on investment in 1987 equal to or greater than 11.6 percent, the Commission-determined, industry-wide cost of capital for that year.[85] The Commission's revenue-adequacy findings are used for the purpose of establishing eligibility for the Zone of Rate Flexibility under 49 U.S.C. 10707a(d). These findings are also considered in individual rate reasonableness proceedings conducted under 49 U.S.C. 10701a.

Rates for the rail transportation of nonferrous recyclable commodities are regulated without regard to market dominance and are subject to a R/VC ceiling which is calculated by the Commission. The most recent calculations set the rate cap at 149.8 percent R/VC for 1987,[86] and 147.7 percent for 1988.[87]

In fiscal year 1988, the Commission dismissed as settled a complaint concerning rates on automobile shredder residue.[88] Individual recyclable rates complaints not involving automobile shredder residue are being held in abeyance as a result of an earlier court decision barring individual complaints against a carrier who is in aggregate compliance with the R/VC ceiling.[89] However, the Commission resolved one complaint involving the California intrastate rates of carriers who were in overall compliance.[90] The Commission essentially found that the intrastate rates at issue were at all times governed by Federal standards and the Commission's aggregate rate-reduction procedures, even though California regulated them until 1982 when the Commission assumed jurisdiction at that state's request.[91] Although these rates were not included in the original data base for interstate rates when they were subject to state regulation, the Commission held that this would not affect the Commission's power subsequently to issue a declaratory order, and the defendants in the case at issue were ordered to reduce their rates to the level required to attain aggregate compliance. The Commission determined, though, that reparations were barred by the statute of limitations.[92]

In a case involving West Virginia intrastate traffic, vacated as moot[93]

[84]Ex Parte No. 476, *Railroad Revenue Adequacy—1987 Determination* (not printed), served July 22, 1988.

[85]*Railroad Cost of Capital—1987*, 4 I.C.C.2d 621 (1988).

[86]Ex Parte No. 394 (Sub-No. 4), *Cost Ratio for Recyclables—1987 Determination* (not printed), served November 20, 1987.

[87]Ex Parte No. 394 (Sub-No. 5), *Cost Ratio for Recyclables—1987 Determination* (not printed), served September 15, 1988.

[88]No. 39669, *Newell Enterprises, Inc.* v. *The Atchison, Topeka and Santa Fe Railway Company* (not printed), served December 28, 1987.

[89]*Norfolk and Western Ry. Co.* v. *U.S.*, 763 F.2d 373 (D.C. Cir. 1985).

[90]No. 40112, *Aluminum Company of America* v. *The Atchison, Topeka and Santa Fe Railway Co.* (not printed), served February 5, 1988, corrected decision served February 8, 1988.

[91]*State Intrastate Rail Rate Authority—P.L. 96-448*, 365 I.C.C. 700 (1982).

[92]49 U.S.C. 11706(c).

[93]*Pet. for Review of Decision of PSC of WVA*, 4 I.C.C.2d 102 (1987).

a 1986 decision[94] in which it had interpreted rules governing intrastate coal rate reasonableness cases, yet it adopted the principles of that decision as a policy statement. The Commission also considered four intrastate certification petitions. Virginia[95] and Arkansas[96] filed for recertification. Virginia's five-year certification expired on August 28, 1988, and Arkansas's is to expire on March 25, 1989. Pending final recertification, Virginia was granted provisional certification to continue regulating intrastate traffic. Final certification was granted to Illinois, subject to that state's adoption of the Commission's final contract rules.[97] Compliance was directed by September 1988, but has not yet been achieved. Oklahoma's initial certification is still pending.[98]

The Commission resolved a conflict involving inflation-based rate increases between the applicable provision of the Interstate Commerce Act[99] and the Commission's rate prescription authority.[100] In 1977, the Commission had prescribed a rate on trainload coal movements, and that rate had been increased regularly to cover inflation-based cost increases. Additionally, on September 15, 1981, the rate was increased by three percent under the Zone of Rate Freedom provision of the Staggers Act. Balancing the cost recovery and profit-enhancement aspects of pricing flexibility against the public interest in preventing monopolistic gain, the Commission concluded that profit-enhancing increases may not lawfully be applied to prescribed rates, absent Commission approval.[101] Finding that the rate in question had not been lawfully published, the Commission ordered the payment of refunds.

The Commission's cost recovery procedures determine the maximum Rail Cost Adjustment Factor (RCAF) rate level, which is issued quarterly, and provide adjustments to maximum railroad rate levels on market-dominant traffic for cost increases or decreases. Since mid-November 1986, an extended "holding" down of rate levels was ordered to compensate for prior cost overstatements,[102] and that order expired during the first quarter of 1988. Maximum RCAF rate levels must now rise and fall with the quarterly RCAF. The first downward adjustment was effective July 1, 1988.[103]

The Commission also proposed changes to the methodology for calculating the fuel component of the index.[104] In an advance notice of proposed rulemaking, the Commission noted that rail cost recovery tariffs have become cumbersome to follow and apply, and sought comments on how it might revise the governing regulations.[105]

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[94] No. 38793, *Petition for Review of a Decision of the Public Service Commission of West Virginia Pursuant to 49 U.S.C. 11501* (not printed), served April 18, 1986.

[95] Ex Parte No. 388 (Sub-No. 33), *Intrastate Rail Rate Authority—Virginia* (not printed), served August 19, 1988.

[96] Considered in Ex Parte No. 388 (Sub-No. 2), *Intrastate Rail Rate Authority—Arkansas.*

[97] *Ex Parte No. 388 (Sub-No. 7), Interstate Rail Rate Authority—Illinois* (not printed), served March 28, 1988.

[98] Considered in Ex Parte No. 388 (Sub-No. 26), *Intrastate Rail Rate Authority—Oklahoma.*

[99] 49 U.S.C. 10707a.

[100] 49 U.S.C. 10704.

[101] No. 36114 *et al., Potomac Electric Power Company v. Consolidated Rail Corporation* (not printed), served October 19, 1987.

[102] *See Railroad Cost Recovery Procedures*, 3 I.C.C.2d 60 (1986).

[103] Ex Parte No. 290 (Sub-No. 5) (88-3), *Quarterly Rail Cost Adjustment Factor* (not printed), served June 20, 1988.

[104] Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures* (not printed), served July 21, 1988.

[105] Ex Parte No. 290 (Sub-No. 6), *Amendments to Rail Carrier Cost Recovery Tariffs*, 53 F.R. 31729 (August 19, 1988).

Carriers remain free to respond to competitive forces by "flagging out" or holding down authorized cost recovery increases in selected markets. When carriers adopt a cost recovery increase, or otherwise increase rates in "master tariff" format rather than by revised individual tariff, they are required to incorporate changes into their individual tariffs within two years of the original effective date of the rate change. After granting several extensions to the two-year deadline applying to this matter, the Commission issued a decision requiring rail tariff publishers to submit a plan to assure deadline compliance by September 30, 1991. Publishing agents have been advised that there will be no further extensions granted and, should railroads fail to complete the process of incorporating rates into tariffs, rates will thus become void.[106] The Commission is also monitoring this activity by requiring publishing agents to furnish quarterly reports detailing their progress.[107]

The Commission also proposed new rules to accommodate the filing of electronic tariffs and to simplify tariff filing,[108] and a final decision on these new rules was pending at the end of the fiscal year. The Commission also adopted final rules that will simplify billing procedures by allowing rail carriers to file electronic distance determination systems in place of printed distance guides,[109] and to use electronic bills of lading.[110]

The Commission considered the formalities of tariff publication in affirming a 1985 decision that had found that certain changes in minimum-weight provisions were lawfully published and not mis-symbolized.[111] In two decisions on court referral, it determined which of two tariff provisions applied to a movement. In one, a carrier was found entitled to switching charges, and not to a line haul division, for shipments interchanged within the destination switching district.[112] In the other, the Commission found for a carrier on a disputed commodity classification, and also found that the collection of undercharges would not be an unreasonable practice under the Commission's equitable-relief principles.[113] The Commission noted, however, that many, if not all, of the involved boxcar movements were unregulated because they had occurred while the Commission's boxcar exemption[114] was in effect. The Commission advised the referring court that exempted movements would be governed by principles of contract law and not by the Commission's rules and precedents on classification and equity.[115]

Two other court-referred tariff cases decided by the Commission involved the Commission's interpretation of tariff provisions. In one

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[106] See 49 U.S.C. 10762(d)(2).

[107] No. 40154, *Extension of Expiration Date of Master Tariff Increases—Amendments No. 5 and 12 to Special Tariff Authority* (not printed), served May 27, 1988.

[108] Ex Parte No. 444, *Electronic Filing of Tariffs*, F.R. 39549 (October 22, 1987).

[109] *Rev. of Tariff Regula.—Computer Determ. of Mileages*, 4 I.C.C.2d 350 (1988).

[110] *Electronic Transmission of Freight Bills*, 4 I.C.C.2d 587 (1988).

[111] No. 39811, *Airco Welding Products Company v. Missouri Pacific Railroad Company* (not printed), served January 4, 1988.

[112] No. 37440 (Sub-No. 1), *Missouri-Kansas-Texas Railroad Company—Southern Pacific Transportation Company—Joint Petition for Declaratory Order—Recovery of Transportation Charges* (not printed), served November 20, 1987.

[113] See *Buckeye Cellulose Corp. v. L&N R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom. Seaboard System R.R., Inc. v. U.S.*, 794 F.2d 635 (11th Cir. 1986).

[114] *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 424 (1983), *remanded in part sub nom. Brae Corp. v. U.S.*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. den.* 471 U.S. 1069 (1985).

[115] *Mo-Ks-Tx R—Certainteed Corp.—Pet. for Declaratory Order*, 4 I.C.C.2d 736 (1988).

case, the Commission denied a petition to reopen and reconsider a July 1987 decision which interpreted tank car minimum-load provisions.[116] In the other, the Commission approved a carrier's assessment of storage charges for "dismantler" cars held on its tracks.[117]

In a declaratory proceeding, the Commission interpreted an "all freight" switching tariff to include new empty tank cars.[118] Also, in an initial decision that became administratively final, the assessment of a higher tariff rate on a shipment that had moved beyond a destination rail terminal by motor carrier, notwithstanding the shipper's failure to complete a required "truck beyond" notation on a bill of lading, was found unreasonable.[119] The notation requirement was found to serve no useful purpose, and its absence was found not to affect the carrier's service or billing. Damages were awarded for shipments within the applicable statute-of-limitation period.

The Commission also considered several tariff-exemption petitions. In two cases, the Commission exempted movements from regulation to allow reparations or the waiver of undercharges where a filing error made an intended tariff inapplicable.[120] In other instances, the Commission rejected two petitions for an exemption to apply an intended tariff rate where the involved shipments had moved before the effective date of the intended tariff.[121]

In a general exemption proceeding, seven Class III railroad affiliates of the Delaware Otsego Corporation were exempted at their request from boxcar joint-rate regulation. The effect of this exemption was to permit them to exercise the empty-car provisions in 49 CFR 1039.14[122] The Commission also issued a notice of proposed rulemaking to exempt from regulation 633 of approximately 980 classes of miscellaneous manufactured commodities.[123] The Commission tentatively found that truck competition for the specified classes was intense overall and geographically widespread. The proposed exemption would be nationwide and would cover all provisions of the Interstate Commerce Act, except those pertaining to loss and damage. Carriers would still be required to comply with the Commission's accounting and reporting requirements, and no antitrust immunity would be conferred for collectively established rates.

The Commission's case work in the car-hire area consisted mainly of refining and applying previously announced principles. The Commission denied a petition to clarify or reconsider its prior adoption of a

[116]No. 40101, *J.M. Huber Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al.* (not printed), served July 15, 1988.

[117]No. 40126, *Industrial Scrap Corporation v. Indiana Harbor Belt Railroad Company* (not printed), served October 5, 1987.

[118]No. 40158 *Chicago and North Western Transportation Company—Petition for Declaratory Order—Movement of New Empty Tank Cars* (not printed), served September 1, 1988.

[119]No. 40135, *Shintech, Inc. v. Union Pacific Railroad, et al.* (not printed), served November 2, 1987.

[120]No. 40179, *The Atchison, Topeka and Santa Fe Railway Company—Exemption—To Pay Reparations* (not printed), served May 6, 1988; and No. 40183, *Richmond, Fredericksburg & Potomac Railroad Co.—Exemption—To Waive Undercharges* (not printed), served June 7, 1988.

[121]No. 40180, *Norfolk and Western Railway Company and The Pittsburgh and Lake Erie Railroad Company—Exemption—To Waive Undercharges* (not printed), served July 11, 1988; and No. 40181, *Norfolk and Western Railway Company and Bessemer and Lake Erie Railroad Company—Exemption—To Waive Undercharges* (not printed), served July 11, 1988.

[122]Ex Parte No. 346 (Sub-No. 19A), *Delaware Otsego Corp.—Petition for Exemption—Boxcar Provisions*, 52 F.R. 37970 (1987).

[123]Ex Parte No. 346 (Sub-No. 24), *Rail General Exemption Authority—Miscellaneous Manufactured Commodities* (not printed), served February 9, 1988.

national tank car mileage-allowance system.[124] It then applied those rules[125] to two complaint proceedings.

The first involved an appeal of a 1987 decision allowing carriers to charge for movements of privately owned cars to and from private repair facilities.[126] The Commission found that car owners would be compensated adequately under the mileage allowance rules. It rejected contentions that private car owners had relied on prior practice in negotiating car-hire agreements, and instead found that the Interstate Commerce Act does not guarantee the recoupment of full ownership costs by car owners. The Commission stated, too, that tariff caps on mileage allowances are subject to investigation if they prevent car owners from receiving their full mileage allowance.

The Commission instituted two separate investigations to determine whether protested tariff charges, published to apply to the repair movement of empty private cars, violated the terms of the tank car allowance system.[127] When the respective tariff items were withdrawn, the investigations were discontinued.[128]

In the second case, where a mileage allowance cap had previously been found unlawful, the Commission awarded damages based on the difference between the original allowance and the unlawful reduced allowance, less any amounts resulting from reduced rates on the commodities carried.[129]

In a complaint brought by a repair facility, the Commission found lawful the assessment of switching and stop-off charges on repair moves, but concluded that, for the future and pending litigation, they could not be assessed against the repair facility complainant because it was neither the consignor, consignee, nor owner, nor was it obligated by statute, contract, nor prevailing custom to pay the charges.[130] The Commission granted three exemptions to allow the payment of mileage allowances on revenue movements in private cars that were unregistered at the time of movement.[131]

Carriers who enter into agreements jointly to consider and publish rates, and shippers who enter into agreements jointly to consider the rate practices associated with carriers' use of shippers' rolling stock, are exempt from antitrust laws[132] with respect to making and carrying out agreements if the Com-

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[124]Ex Parte No. 328, *Investigation of Tank Car Allowance System—Petition for Clarification or Reconsideration* (not printed), served November 19, 1987.

[125]*Investigation of Tank Car Systems*, 3 I.C.C. 2d 196 (1986).

[126]No. 35404, *General American Transp. Corp. v. Indiana Harbor Belt Railroad Co.* (not printed), served February 29, 1988.

[127]No. 40182, *Charges for Movement of Empty, Privately-Owned Rail Cars by Peducah & Louisville Ry., Inc. for Repairs*, (not printed), served April 12, 1988; and No. 40191, *Charge for Movement of Empty Cars, Chicago, Missouri and Western Rwy.* (not printed), served August 22, 1988.

[128]*Ibid.*, in unprinted decisions served May 4, 1988 and September 23, 1988, respectively.

[129]No. 39909, *Cap on Mileage Allowances for Use of Privately Owned Tank Cars SP* (not printed), served July 13, 1988.

[130]No. 40134, *Mobile Tank Car Services v. Southern Pacific Company* (not printed), served July 1, 1988.

[131]No. 40157, *CSX Transportation Inc.—Exemption—To Pay Reparations* (not printed), served December 30, 1987; No. 40163, *The Atchison, Topeka and Santa Fe Railway Company—Exemption—To Pay Mileage Allowances* (not printed), served March 23, 1988; and No. 40166, *Norfolk and Western Railway Company, Southern Railway Company and Consolidated Subsidiaries—Petition for Exemption* (not printed), served April 22, 1988.

[132]The Sherman Act (15 U.S.C. 1, *et seq.*); the Clayton Act (15 U.S.C. 12, *et seq.*); the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*); Sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9); and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a).

mission approves the agreements.[133] In fiscal year 1988, the Commission approved a number of agreements—the so-called "Section 5b" agreements—between carriers. Specifically, in a series of related transactions, the Commission first approved the National Railroad Freight Committee's (NRFC) agreement for joint consideration and approval of standardized packaging rules, shipping rules, and commodity classification ratings.[134] This agreement superseded Section 5b Application No. 5 pertaining to the Uniform Classification Committee (UCC), and the UCC's functions were transferred to the NRFC. This, in turn, cleared the way for two rate bureaus to request, and for the Commission to grant, cancellation of their respective agreements.[135] The applicants consolidated their operations into a tariff publishing agency, eliminating any need for antitrust immunity. The agreement in Application No. 5 had required carriers to belong to a regional rate bureau in order to participate in the UCC; this remaining function of the rate bureau applicants was eliminated in Application No. 12.

In other carrier applications, the Committee approved an agreement of the Western Railroad Traffic Association (WRTA) setting forth its organizational structure and procedures for the collective consideration of rates and related matters, but denied without prejudice the WRTA's request to expand its subject matter jurisdiction to include the matter in Section 5b Application No. 4, Southern Ports Foreign Freight Committee.[136] In related actions, the application of two Canadian carriers was dismissed at their request.[137]

Finally, the Commission approved an agreement of the railroad members of the Association of American Railroads collectively to set per diem (car hire) charges and car mileage allowances.[138]

The Commission also disposed of two cases involving shipper antitrust immunity. In one case, a petition to revoke antitrust immunity was granted to a shipper association in dissolution, subject to a two-year retention of records.[139] In the other case, the Commission found that an agreement to amend a shippers' committee's by-laws did not require Commission approval, and so dismissed the committee's petition.[140]

The Commission also began deliberations on a major case involving antitrust immunity for a carrier combination providing car service. Combinations of carriers (pooling agreements), when approved by the Commission, are exempt from Federal antitrust laws.[141] Approval is contingent upon the Commission finding an agreement to be in the public interest and not an undue restraint on competition.[142] During

[133]See 49 U.S.C. 10706.

[134]Section 5b Application No. 12, *National Railroad Freight Committee Agreement* (not printed), served November 27, 1987 (provisional approval automatically became final after required modifications were submitted on March 22, 1988).

[135]Section 5b Application No. 3, *Eastern Railroads—Agreement*, and Section 5b Application No. 6, *Southern Railroads—Agreement* (not printed), served March 11, 1988.

[136]Section 5b Application No. 2, *Western Railroads—Agreement* (not printed), served June 27, 1988.

[137]Section 5b Application No. 11, *Canadian Railroads—Agreement* (not printed), served March 1, 1988.

[138]Section 5b Application No. 7, *Railroad per Diem and Mileage Allowances Agreement* (not printed), served September 22, 1987 (provisional approval automatically became final after required revisions were submitted on February 1, 1988).

[139]Section 10706(a)(5)(A) Application No. 1, *Shipper Equitable Compensation Action Committee* (not printed), served June 3, 1988.

[140]Section 10706(a)(5)(A) Application No. 2, *LO Shippers Action Committee* (not printed), served June 28, 1988.

[141]See 49 U.S.C. 11341(a).

[142]See 49 U.S.C. 11342.

the fiscal year, the Trailer Train Company asked the Commission to approve a 15-year extension of its 1974 flatcar pooling arrangement.[143] The Commission began an investigation, currently pending, to determine whether Trailer Train is in a position to exercise undue market power (monopsony) in buying flatcars.[144]

The Commission also issued final decisions in two other cases involving rail pooling agreements. In one, the Commission approved an agreement among 22 rail carriers to pool boxcars of all designations.[145] Under the agreement, carriers are to contribute boxcars in proportion to their use of the pool. They are not to pool earnings, but they may continue to use nonpool cars and freely enter or leave the pool. As approved, the agreement also ensures confidentiality of supply and demand data furnished by the carriers. The Commission found that the agreement will enhance competition and the efficiency of boxcar service and will ensure the quality of equipment maintenance.

In the other case,[146] an existing pool had sought authority or an exemption to amend its agreement to add a shipper executive committee to the pool's management structure. This proposal would have provided shippers a forum for developing a consensus of the pool's performance. The Commission found in this case that its jurisdiction to approve pooling agreements extends only to agreements between regulated common carriers. In dismissing the pool's petition, the Commission noted that the formation of a shipper committee was not barred, but that it would be subject to antitrust laws.

Joint Rate Surcharges, Cancellations, and Competitive Access

Railroad carrier authority to impose commodity surcharges expired on September 30, 1984. Under a Commission exemption, however, negative surcharges (i.e., allowances) may still be applied. Carriers may also impose surcharges on traffic originating or terminating on light-density lines[147], which were those carrying less than 3,000,000 ton-miles of freight per mile for a revenue-inadequate carrier, or 1,000,000 ton-miles for a revenue-inadequate carrier, in the most recent calendar year for which data are available. Surcharges may be applied when existing rates do not provide revenues adequate to cover 110 percent of carrier variable costs, or 100 percent of the reasonably expected costs of continuing to operate a line.

As was the case in the past several years, the nation's railroads continue to make relatively infrequent use of joint-rate surcharges and cancellations.[148] Railroads filed

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[143] *American Rail Box Car Co.—Pooling*, 347 I.C.C. 862 (1974).

[144] Finance Docket No. 27590 (Sub-No. 1), *Trailer Train Company et al.—For Approval of the Pooling of Car Service with Respect to Flat Cars* (not printed), served July 28, 1988.

[145] Finance Docket No. 30969, *Railroad Car Service Pooling Applications (Boxcars)* (not printed), served October 9, 1987.

[146] Finance Docket No. 29653 (Sub-No. 4), *The Baltimore and Ohio Railroad Company, et al.—Pooling of Car Service Regarding Multi-Level Cars* (not printed), served April 26, 1988.

[147] 49 U.S.C. 10705a(b)(1).

[148] Under Section 217(c)(1) of the Staggers Act, the Commission is to include in each of its annual reports an analysis of the preceding year's surcharge and joint-rate cancellation activity. In fiscal year 1988, the Commission used a tariff-monitoring service to track this activity, a change from prior years when the Commission's monitoring consisted of selected contacts with carriers and carrier rate bureaus or associations. Increases in the count of surcharges or cancellations may be due to the change in the ICC's monitoring procedure.

23 light-density-line surcharges to go into effect during fiscal year 1988, and only one negative surcharge. The Soo Line Railroad Company filed a single negative surcharge on a movement of chemical and allied products but, overall, the revenue impact of surcharge and joint-rate cancellation actions during the past year appears to be minor.

Both large and small railroads made use of light-density-line surcharges. The Consolidated Rail Corporation (Conrail) filed a single, $900 surcharge on Castleton-on-Hudson, New York, traffic. Another Class I railroad filing light-density-line surcharges becoming effective during the year was the Southern Pacific Transportation Company, which filed three surcharges ranging from $75 to $1000. Fourteen Class III lines filed 18 surcharges that became effective during the fiscal year with surcharge amounts ranging from $15 to $2,000, and with most falling within the $100-to-$500 range. Six surcharges applied to all traffic of the railroads concerned, and the surcharges affecting the greatest volume of traffic were those of the Gulf & Mississippi Railroad Corporation and its successor, the Southrail Corporation. The revenue impact of these surcharges should approximate the $2.9 million estimate by SouthRail for similar temporary surcharges reported for fiscal year 1987.

Railroads canceled six light-density line surcharges. The Soo Line canceled four, three of which were replaced by new surcharges imposed by the Wisconsin Central Limited during the past fiscal year. The Illinois Central Gulf Railroad and Wisconsin Central also removed surcharges.

Few railroads unilaterally canceled joint rates during the year. Conrail filed two such cancellations, one on liquid synthetic plastics and plastic scrap from the Southwest to the central eastern United States, and another on point-to-point tinplate movements from West Virginia to the Southeast. Other Class I railroads made five such filings; four were by the Soo Line on specific grain movements, and one was by CP Rail on sulphur movements from British Columbia to Georgia.

A study of the Commission's boxcar traffic exemption sponsored by its Office of Transportation Analysis shed some light on industry experience with cancellation of boxcar joint rates following the January 1, 1984, effective date of that exemption. Contractors retained by the Commission interviewed employees of major railroads and selected short lines and conducted a random-sample survey of 46 shippers. The study found that highly competitive pressures have led most railroads to seek to concentrate traffic on their high-density, long-haul corridors, primarily by incorporating restricted routing in new contracts and exempt quotes.

As indicated by many Class I carriers, connecting short lines are better able than trunk lines to gain available traffic that will be of benefit to them. In general, short lines and connecting major railroads have maintained good working relations with each other. Major lines even reported to the Commission the arrangement of divisions with short lines which are designed financially to strengthen the short lines. Though free to cancel joint rates, most carriers have elected to retain them in the form of published tariffs (used especially by smaller shippers) or in the form of contract rates or exempt quotes, which primarily represent customized or joint ratemaking for larger shippers.

In summary, a few large railroads and several smaller ones continue infrequently to utilize the freedom they have to add surcharges to, or to cancel, joint rates. Carriers' relief from undesirable divisions seems to continue to come about largely through other means, such as contract rates and new restricted-routing tariffs. A Commission-sponsored staff study on the effects of the ICC's boxcar traffic exemption confirms that, by and large, small carriers have not been harmed by surcharge or cancellation provisions, and that such provisions have done little to diminish the industry's continuing, general reliance on joint rates for interline traffic.

No joint-rate surcharges and only three light-density-line surcharges filings came before the Commission in fiscal year 1988. The Commission voted not to suspend and not to investigate surcharges by the Georgia Eastern Railroad Company[149] and by the Southern Pacific Transportation Company,[150] but instituted an investigation of another Southern Pacific surcharge. The Commission found that the line at issue qualified as a light-density line and concluded that the surcharge was lawful.[151] Protestants failed to show that the surcharge would produce revenues above 110 percent of variable costs, plus 100 percent of reasonably expected costs of continued operation, based on restated land and salvage values for the line and an appropriate rate of return on investment.

During the past fiscal year, the Commission proposed modifications to its rules governing the computation of reasonably expected costs in connection with light-density surcharges.[152] The modifications reflect recent findings of the Railroad Accounting Principles Board regarding surcharge costing. Specifically, the Commission proposed: (1) that the return-on-investment component of reasonably expected costs be determined using the "nominal" cost of capital rate; (2) that any projected holding gains (for losses) that would accrue to a carrier from the retention of rail line assets for a one-year period be included as a reduction of return on investment; and (3) that reasonably expected costs should be calculated on the effective date of a surcharge.

Progress was also made regarding the re-establishment or replacement of rates canceled by Conrail in 1981 on movements through Eastern and Midwestern rail gateways.[153] Interested parties were directed to file specific prescription requests, but only four were filed.

The Commission also continued to implement the competitive-access rules adopted last year. In two proposed joint-rate cancellation cases, the Commission voted not to suspend nor investigate and thus allowed the cancellations to become effective as published.[154]

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[149]Suspension Case No. 71406, *Light Density Line Surcharge, Georgia Eastern R.R.* (not printed), served March 4, 1988.

[150]Suspension Case No. 71428, *Light Density Line Surcharge, SPT, Victoria Branch* (not printed), served August 4, 1988.

[151]No. 40159, *Light Density Line Surcharge, SP, Placerville Branch* (not printed), served June 20, 1988.

[152]Ex Parte No. 402, *Reasonably Expected Costs (Implementation of the Railroad Accounting Principles Board Findings)* (not printed), served May 13, 1988.

[153]No. 38676, *Changes in Routing Provisions—Conrail—July 1981* (not printed), served June 10, 1988.

[154]Suspension Case No. 71378, *Cancellation of Joint Rate on Perlite Rock, DRGW* (not printed), served October 5, 1987; and Suspension Case No. 71380, *Cancellation of Joint Rates and Routes on Synthetic Plastics, Conrail* (not printed), served October 9, 1987.

Competitive access involves a prescription by the Commission of a through route or joint rate,[155] a reciprocal switching arrangement, or an arrangement for the joint use of terminal facilities.[156] A Commission prescription must be necessary to remedy or to prevent an action that is contrary to the Interstate Commerce Act's competition policies, or that is otherwise anticompetitive.[157]

In fiscal year 1988, the Commission clarified a prior year's order that had allowed the Denver and Rio Grande Western Railroad Company to use St. Louis Southwestern Railway Company's terminal facilities in Herington, Kansas, to reach the tracks of the Missouri-Kansas-Texas Railroad Company, and had limited interchange to no more than 100 trains per year.[158] A determination of conditions and compensation was held in abeyance at the request of involved parties.

The Commission additionally began an investigation into a Southern Pacific Transportation Company proposal to revise and restructure switching charges at the industry, warehouse, and interchange tracks it serves in connection with line-haul movements by four other Class I carriers. This proceeding has been expanded to investigate subsequent responsive actions by certain connecting carriers.[159]

Few competitive-access cases were pending at the close of the fiscal year. One pending case involves trackage rights to a foundry.[160] Two other competitive-access cases were resolved without reaching the merits of the cases. In one, a longstanding complaint by a shipper seeking reciprocal switching to open its plant to a second carrier was settled by the parties and, after new tariff provisions providing for reciprocal switching became effective, the proceeding was dismissed.[161] In the other case, a captive shipper entered into a contract with a dominant carrier and withdrew its request that the Commission grant trackage rights to a second carrier.[162]

Abandonments

The number of miles of track authorized by the Commission to be abandoned by the nation's railroads increased in fiscal year 1988, coincident with a decline in the trackage sold to new short line carriers. As noted above in the "Acquisition, Operation, and Construction" segment of this chapter, the prior trend of declining abandonment activity was thus reversed. Significant short line sales effectively ceased following the decision of the U.S. Court of Appeals for the Third Circuit in a case which mandated that a railroad negotiate with labor representatives prior to the consummation of a sale.[163]

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[155] 49 U.S.C. 10705.

[156] 49 U.S.C. 11103.

[157] See *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), and *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. U.S.*, No. 87-1032 (D.C. Cir., Sept. 16, 1988).

[158] Finance Docket No. 30759, *Denver and Rio Grande Western Railroad Company and Missouri-Kansas-Texas Railroad Company v. St. Louis Southwestern Railway Company* (not printed), served November 16, 1987.

[159] No. 40178, *SP/SSW Switching Charges on Carloads of Grain at Kansas City* (not printed), served March 30, 1988; and No. 40178 (Sub-No. 1), *Reciprocal Switching Charges, Southern Pacific System* (not printed), served April 5, 1988.

[160] No. 40068, *Shenango, Inc. v. Pittsburgh, Chartiers and Youghiogheny Railway Company* (not printed), served August 22, 1988.

[161] Finance Docket No. 29883, *Universal Forest Products, Inc. v. Seaboard C.L. R.R. Co.* (not printed), served April 27, 1988.

[162] No. 40127, *Western Fuels Association, Inc. v. Illinois Central Gulf Railroad Corporation* (petition to dismiss pending).

[163] *RLEA v. Pittsburgh & Lake Erie RR*, 845 F.2d 420 (3rd Cir. 1988).

The Commission allowed carriers to abandon 2,996.21 miles of track in fiscal year 1988, up from 1,932.61 miles in fiscal year 1987 and 2,087.85 miles in fiscal year 1986. These figures include Commission action taken both by exercising its authority over abandonments under 49 U.S.C. 10903, and by granting exemptions from statutory review according to its exemption authority at 49 U.S.C. 10505, and reflect a significant increase in carrier requests for such authority.

The past fiscal year also was highlighted by a number of innovative Commission actions in the abandonment area to broaden the rights of interested parties to acquire lines which would otherwise have been abandoned, and to broaden the application of the National Trails System Act (Trails Act) and environmental provisions of that statute.[164] In this area, the Commission:

- Allowed offers of financial assistance for continued rail service in connection with exempt abandonments or discontinuances;
- Proposed reporting requirements concerning the outcome of negotiations to transfer railroad rights-of-way for interim trail use and rail banking purposes;
- Proposed to consider, during its analysis of whether to grant or deny applications for abandonment, the possibility that a shipper could purchase or subsidize a rail line;
- Refined procedures concerning notices of exemption as they relate to environmental issues;
- Revised the rate-of-return figure to be used in abandonment proceedings;
- Proposed to change the way property taxes are treated in abandonment proceedings;
- Delegated authority to the Director of the Commission's Office of Proceedings to decide petitions requesting the imposition of public-use conditions in abandonment exemptions, as well as the authority to impose conditions limiting the salvage of rail properties for environmental and historic preservation purposes.

Of the approximately 3,000 miles of track authorized for abandonment during fiscal year 1988, Conrail was granted permission to abandon 126.72 miles. The Commission has taken separate note of Conrail abandonments since 1981 for two reasons. First, Conrail applications are filed under special provisions of the Northeast Rail Service Act of 1981 (NERSA)[165] which provided for automatic approval of Conrail abandonment applications in the absence of purchase-subsidary offers. Second, Conrail's abandonment program represents an important part of the long struggle to revitalize rail service in the Northeast following the Penn Central Railroad bankruptcy in 1970. Conrail's authorization for the abandonment of 126.72 miles this year was up from the 115.57 miles authorized in fiscal year 1987, reflecting a nationwide trend, but was not as high as the 177.55 miles authorized for abandonment in fiscal year 1986.

Conrail filed eight applications this fiscal year to abandon 29.22 miles of track. One application involving the proposed abandonment of a .7-mile track was pending at the

[164] 16 U.S.C. 1247(d).

[165] 45 U.S.C. 748.

end of the fiscal year. Four offers of financial assistance to purchase Conrail lines totaling 11.57 miles were made and, by the end of the fiscal year, one offer was pending. One application involving .21 miles was dismissed after Conrail and an interested party reached agreement for the sale of a portion of that line.[166] There were 37 "notices of insufficient revenues"—the filing required under NERSA to trigger automatic abandonment—involving the 138.37 miles of line on file with the Commission at the end of fiscal year 1988.[167] Conrail may still file NERSA applications to abandon lines identified in notices of insufficient revenue that were filed with the Commission by October 31, 1985.

In a decision which marked the end of protracted litigation, the Commission granted Conrail's request to dismiss its application to abandon a 1.45-mile line in New York City.[168] The application had already been processed under NERSA and an offer of financial assistance had been rejected as not *bona fide*. The Commission gave substantial weight to the position of the City of New York and the State of New York Department of Transportation that the public interest would best be served by ending the three-year-old proceeding.

Beside the "notice of insufficient revenue" process available to Conrail, abandonment cases are typically processed in three different ways: a formal application may be filed, subject to considerable evidentiary requirements; an individual petition seeking exemption under 49 U.S.C. 10505 from the formal review process may be filed; or a notice of exemption may be used if a line qualified under abandonment class-exemption rules.[169]

Railroads other than Conrail filed 42 applications for abandonment involving 1,440.78 miles during fiscal year 1988. At the end of the fiscal year, 19 applications to abandon 525.78 miles were pending. The Commission issued decisions on the merits of 45 applications involving 1,293.990 miles. Of these, three applications involving 32.89 miles were denied. Nine applications involving 205.28 miles were dismissed, including three (involving 110 miles) in which the lines involved were sold.

As these figures show, the Commission has granted more applications than it has denied. As the record in each case indicates, the lines authorized for abandonment did not provide enough revenue to cover the cost of providing rail service over them and, on balance, the cost to the carrier involved outweighed the impact of abandonment on its shippers and localities along the lines. In most cases, revenues were insufficient to cover operating expenses, let alone other costs such as rehabilitation, normalized maintenance, and opportunity costs.[170] In certain other cases, while revenues may have barely

[166]Docket No. AB-167 (Sub-No. 1034N), *Conrail Abandonment of the Linden Spur Track in Union County, NJ* (not printed), served June 28, 1988. A certificate was issued May 18, 1988, authorizing abandonment of a .21-mile portion of the line not included in the offer of financial assistance.

[167]The Commission's prior annual report incorrectly showed the number of notices of insufficient revenues on file with the Commission at the end of fiscal year 1987 as 46, involving 169.43 miles of line. The correct number and mileage were 45 and 169.26, respectively.

[168]Docket No. AB-167 (Sub-No. 493N), *Conrail Abandonment of a Portion of the West 30th Street Secondary Track in New York, NY* (not printed), served February 11, 1988.

[169]49 CFR 1152.50.

[170]See Docket No. AB-3 (Sub-No. 66), *Missouri Pacific Railroad Company—Abandonment—In Muskogee, Wagoner and Tulsa Counties, OK* (not printed), served December 16, 1987; Docket No. AB-3 (Sub-No. 72), *Missouri Pacific Railroad Company—Abandonment—In Desha and Chicot*

covered operating expenses, they were not enough when normalized maintenance, the cost of rehabilitation, and opportunity costs were factored into the equation.[171]

In an unusual proceeding, the Commission granted a railroad's application to abandon an 11-mile segment of its line that was an intermediate segment of a larger line over which a protesting railroad held trackage rights and performed substantial service.[172] The applicant in this case had sought a forced discontinuance of the protesting railroad's operation, which the Commission granted. In reaching its decision, the Commission gave significant weight to opportunity costs, in that it distinguished between requiring a railroad to incur opportunity costs for the benefit of rail-dependent shippers faced with a loss of rail service, and requiring a railroad to incur opportunity costs so that a competing railroad would not have to bear them. The Commission found that, overall, the balance weighed in favor of the applicant and that the applicant was, in effect, maintaining the line for the benefit of its competitor.

The Commission denied abandonment requests where insufficient cost evidence was presented to show that a line was being operated at a loss and where there was shown to be a clear adverse impact on shippers and communities and a minimum burden on the railroads to operate the lines.[173]

Of the final decisions issued by the Commission, 13 abandonment applications involving 393.59 miles were automatically granted because they were unopposed. Among opposed cases which were granted, the Commission decided not to investigate nine cases involving 267.33 miles, and to set 14 cases involving 504.90 miles for modified procedure. Three additional, opposed cases involving 32.89 miles were set for modified procedure and were

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Counties, AR and East Carroll, Madison, Tensas and Concordia Parishes, LA (not printed), served July 11, 1988; Docket No. AB-3 (Sub-No. 74), *Missouri Pacific Railroad Company—Abandonment—In Johnson County, AR* (not printed), served August 3, 1988; Docket No. AB-10 (Sub-No. 47), *Norfolk and Western Railway Company—Abandonment and Discontinuance—Between Decatur and Farmdale Junction in Mason, DeWitt, Logan and Tazewell Counties, IL* (not printed), served December 9, 1987; Docket AB-19 (Sub-No. 112), *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company—Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia* (not printed), served March 28, 1988; Docket No. AB-33 (Sub-No. 53), *Union Pacific Railroad Company—Abandonment—Between Hansen and River, in Hall Count, NE* (not printed) served September 1, 1988; Docket No. AB-52 (Sub-No. 57), *The Atchison, Topeka, and Santa Fe Railway Company—Abandonment—In John, Wyandotte and Leavenworth Counties, KS* (not printed), served June 3, 1988; and Docket No. AB-70 (Sub-No. 3), *Florida East Coast Railway Company—Abandonment—In St. Johns and Putnam Counties, FL* (not printed), served January 12, 1988.

[171]See Docket No. AB-1 (Sub-No. 202), *Chicago and North Western Transportation Company—Abandonment in Nobles and Rock Counties, MN, and Minnehaha County, SD* not printed), served June 16, 1988; Docket No. AB-6 (Sub-No .298), *Burlington Northern Railroad Company—Abandonment and Discontinuance—In Jackson and Cass Counties, MO* not printed), served September 15, 1988; Docket No. AB-18 (Sub-No. 96), *The Chesapeake and Ohio and Railway Company—Abandonment—In Cass, Fulton, Pulaski, and Starke Counties, IN* (not printed), served December 18, 1987; Docket No. AB-18 (Sub-No. 97), *The Chesapeake and Ohio Railway Company—Abandonment—Between Alma and Edmore in Gratiot and Montcalm Counties, MI* (not printed), served April 1, 1988; Docket No. AB-26 (Sub-No. 38), *Tennessee, Alabama and Georgia Railway Company—Abandonment—Between Gadsden and Ewing, Etowah and Cherokee Counties, AL* (not printed), served November 13, 1987; and Docket No. AB-70 (Sub-No. 2), *Florida East Coast Railway Company—Abandonment—In Dade County, FL* (not printed), served December 9, 1987.

[172]Docket No. AB-1 (Sub-No. 206), *Chicago and North Western Transportation Company—Abandonment and Discontinuance of Trackage Rights—Between Hopkins and Chaska, MN* (not printed), served February 10, 1988.

[173]See Docket No. AB-226 (Sub-No. 2), *The Toledo Terminal Railroad Company—Abandon Between Temperance and Gould in Lucas County, OH* (not printed), served December 8, 1987, and Docket No. AB-246 (Sub-No. 1), *Yreka Western Railroad Company—Abandonment—In Siskiyou County, CA* (not printed), served November 6, 1987.

denied on the merits. One case, involving 93.8 miles, which was pending on appeal at the close of the fiscal year, was set for an oral hearing.

In a decision following an oral hearing held in Riverton, Wyoming, an Administrative Law Judge imposed rehabilitation conditions on a grant of authority to a railroad to abandon and discontinue trackage rights,[174] and required the applicant to establish a trust fund for the restoration of the segment of line scheduled for sale to ensure continued rail service. The Commission decided to hear the applicant's appeal to the initial decision in this case, and it was pending at the end of the year.[175]

Numerous railroads filed notices of exemption for lines that had been out of service two years or more under the special class-exemption procedures provided by 49 CFR 1152, Subpart F. Eighty-four such notices involving 1,182.95 miles of track were filed with the Commission. Thirteen notices involving 298.29 miles of track were either withdrawn or rejected.

At the beginning of fiscal year 1988, 15 other petitions for exemption involving 310.95 miles were pending initial decisions. During the fiscal year, 46 additional individual petitions for exemption were filed with the Commission involving 736.57 miles of track proposed for abandonment. Of this total of 61 petitions, 43 were granted involving 806.76 miles, three petitions involving 32.59 miles were dismissed, and 15 petitions covering 208.17 miles of track were pending.

To reduce administrative delay, the Commission made specific delegations of its authority in the exemption area to the ICC's Director of the Office of Proceedings. It adopted rules delegating authority to the Director to decide petitions to reopen abandonment exemption notices for out-of-service lines under 49 CFR 1152 Subpart F, as well as petitions partially to revoke abandonment exemptions authorized under 49 U.S.C. 10505 for the purpose of imposing public-use conditions under 49 U.S.C. 10906.[176] Unlike abandonment applications, exemptions do not involve extensive pre-filing public notice. As a result, requests for public-use conditions are generally filed after notice-of-exemption authorization is published in the *Federal Register*.

It is necessary to expedite decisions on such requests so as not significantly to shorten the statutory, maximum, 180-day, public-use-condition period that might be imposed, and to avoid any certainty by parties which may be negotiating in expectation of a decision imposing the condition. The Commission reserved its authority to decide appeals to the decisions of the Director, which are available as a matter of right on an expedited basis.

Consistent with the delegation of authority to decide requests to impose public-use conditions, the Commission made a similar delegation with regard to petitions to reopen abandonment exemption notices for out-of-service lines under 49 CFR 1152 Subpart F, and

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[174] Docket No. AB-1 (Sub-No. 219), *Chicago and North Western Transportation Company—Abandonment and Discontinuance of Trackage Rights—Between Casper and Riverton in Natrona and Fremont Counties, WY* (not printed, served August 19, 1988.

[175] Docket No. AB-1 (Sub-No. 219), *Chicago and North Western Transportation Company—Abandonment and Discontinuance of Trackage Rights—Between Casper and Riverton in Natrona and Fremont Counties, WY* (not printed), served September 20, 1988.

[176] *Rail Abandonments—Public Use Conditions*, 4 I.C.C.2d 109 (1987).

for petitions partially to revoke abandonment exemptions authorized under 49 U.S.C. 10505 for the purpose of imposing conditions limiting salvage of rail properties for environmental and historical-preservation purposes.[177] While parties requesting the imposition of environmental and historic-preservation conditions typically do not seek to acquire rail proprties other than the right-of-way, and the conditions are not limited to the statutory 180-day public-use period, the public interest issues in those requests are similar to the issues involved in the public-use-condition requests. The Commission also reserved its authority to decide appeals to such decisions.

The Commission further refined its exemption procedures by allowing offers of financial assistance for continued rail service in conjunction with exempt abandonments or discontinuances.[178] Previously, Commission regulations did not contemplate the use of financial assistance procedures except in cases where an abandonment or discontinuance was approved under 49 U.S.C. 10903. The revised rules provide a 10-day period for a minimal expression of intent to file an offer of financial-assistance and an additional 20 days for the development of a more detailed proposal. More time will be allowed if essential information is not provided when timely requested by a potential offeror. The Commission also delegated authority to the Director of the Office of Proceedings to make initial determinations as to whether an offer of financial assistance in such cases satisfies the standards of Section 10905(d).

Eleven offers of financial assistance to purchase rail lines totaling 328.72 miles were made in non-Conrail proceedings. Three lines involving the transfer of 110 miles of track were sold through the abandonment application process during the past fiscal year. Approximately 30 public-use conditions were imposed.

The Commission has instituted a rulemaking proceeding seeking public comment on whether the possibility that a shipper could purchase or subsidize a rail line should be considered in the Commission's analysis of an application for abandonment and, if so, how the issue should be factored into its decision on whether to grant or deny an abandonment proposal.[179] This rulemaking was prompted by a court remand, and the Commission was considering comments filed in response to an advance notice of proposed rulemaking at the end of the fiscal year.

The Commission also issued an advance notice of proposed rulemaking seeking public comment on whether a carrier-vendor should be compensated for the tax liability it will incur upon the sale of personal property in a forced sale under the Commission's financial-assistance procedures. Compensation would be limited to instances where a carrier would have used the personal property attributable to an abandonment elsewhere on its system.[180]

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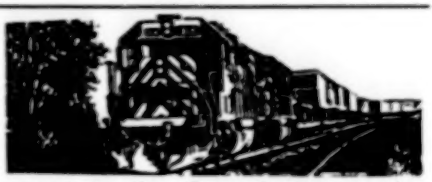
[177] *Rail Abandonments—Envtl. & Historic Preserv. Cond.*, 4 I.C.C.2d 223 (1988).

[178] *Exempt of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[179] Ex Parte No. 274 (Sub-No. 18), *Rail Abandonments—Consideration of Possible Sale or Subsidy of Rail Line in Analysis of an Abandonment Application under 49 U.S.C. 10903*, and Docket No. AB-19 (Sub-No. 110B), *Buffalo, Rochester and Pittsburgh Railway Company and the Baltimore and Ohio and Railway Company—Abandonment and Discontinuance of Service in Indiana County, PA* (not printed), served January 25, 1988.

[180] Ex Parte No. 274 (Sub-No. 19), *Increasing the Offer of Financial Assistance Purchase Price to Compensate for Tax Liability Incurred on the Sale of Personal Property* (not printed), served July 27, 1988.



In 11 abandonment proceedings, the Commission issued either notices or certificates of interim trail use under the Trails Act[181] for use of railroad rights-of-way approved for abandonment as recreational trails. These rights-of-way are placed in a "rail bank" and are available for future restoration of rail service, if needed. Under the Commission's rules, interim trails use is dependent on the voluntary agreement of a carrier, and a right-of-way may be transferred to an interested third party, provided that the carrier involved agrees to such a transfer.[182] To terminate trail use, parties must petition the Commission to reopen an abandonment proceeding so that a trails-use certificate may be vacated and a certificate of abandonment issued. Once full abandonment occurs under this procedure, use of property held by an abandoning railroad under easements may be returned to adjacent landowners. However, the Commission has issued trails-use certificates over the objections of adjacent landowners with reversionary interests, and this subject continues to be controversial, both before the Commission and in the courts.

The Commission also adopted various technical amendments to the rules governning the implementation of Section 208 of the National Trails System Act Amendments of 1983 at 16 U.S.C. 1247(d).[183] This rulemaking proceeding was also reopened to consider a proposal to require railroads and trail groups to report to the Commission on the outcome of negotiations to transfer railroad rights-of-way for interim trail use and rail banking purposes under Section 1247(d) of the Trails Act.[184] Comments were invited on the questions of: (1) whether the rules should address the quality of maintenance of rights-of-way subject to the Trails Act and, if so, what the standards should be and how they should be incorporated into the existing regulatory scheme; and (2) whether trail groups should be required to identify themselves to reversionary interest holders and, if so, how this might be implemented.

In an individual case, certain trail groups asked the Commission to determine whether property being sold by the Burlington Northern Railroad Company was a railroad line subject to Commission jurisdiction, or exempt from the statutory abandonment procedures under 49 U.S.C. 10907(b). The Commission instituted a declaratory order proceeding to resolve the question,[185] and the involved parties were negotiating the issue at the close of the fiscal year.

The Commission additionally approved a railroad proposal to abandon a 10.75-mile line running through Georgetown, the District of Columbia, into nearby Maryland.[186] No shipper opposed abandonment of the line, but numerous parties

[181] 16 U.S.C. 1247(d).

[182] See, e.g., Docket No. AB-1 (Sub-No. 297X), *Chicago and North Western Transportation Company—Exemption Abandonment—In Butler County, IA* (not printed), served March 3, 1988.

[183] *Rail Abandonments—Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987).

[184] Ex Parte No. 274 (Sub-No. 13), *Rail Abandonments—Use of Rights-Of-Way as Trails—Supplemental Trails Act Procedures* (not printed), served May 27, 1988.

[185] Finance Docket No. 31292, *Rails-to-Trails Conservancy, et al., Petition for Declaratory Order* (not printed), served June 27, 1988.

[186] Docket No. AB-19 (Sub-No. 112), *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company—Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia* (not printed), served March 28, 1988.

expressed concern over the disposition of the right-of-way and possible environmental effects. Extensive environmental review occurred, and the Commission concluded that the economic burden on the applicant from continued operation of the line outweighed any adverse impact on the surrounding community. The Commission defined its role as limited to the abandonment proposal, and declined to consider the right-of-way re-use issue as outside its jurisdiction. An offer of financial assistance subsequently was filed to acquire the line being abandoned, the offer was found *bona fide*, and the issuance of a certificate authorizing abandonment was postponed to allow the parties to negotiate a voluntary-purchase agreement.[187]

A request was then made for the Commission to set the terms and conditions. The Commission fixed the purchase price of the line at $25,700,000.[188] In a petition for clarification, the purchaser requested separate valuations for the Maryland and District of Columbia portions of the line. Since the Commission had only one offer before it for purchase of the entire line, it declined to set terms and conditions for less than the whole.[189] The case remained active at the close of the fiscal year.

In the environmental area, the Commission imposed conditions in approximately 30 abandonments[190] to address concerns raised in its environmental assessments conducted according to the Commission's National Environmental Policy Act regulations.[191] In addition, conditions were imposed in approximately 30 abandonments[192] for historic preservation purposes under Section 106 of the National Historic Preservation Act.[193]

To ensure adequate notice and opportunity for the public to comment on environmental assessments in abandonments under the Commission's class exemption for out-of-service railroad lines, the Commission determined that its Office of Transportation Analysis and Section of Energy and Environment have five days from the publication of a notice of exemption in the *Federal Register* to complete and make available all such environmental assessments.[194] Also, an environmental report that is incomplete, inadequate, or erroneous will be rejected by the Director of the Office of Transportation Analysis, and a decision will be issued by the Director of the Office of Proceedings rejecting the notice of exemption at issue.

The Commission issued a notice on its current policy with regard to stay procedures in class exemptions of out-of-service rail lines.[195] That policy is routinely to stay the effectiveness of the class exemption as it applies to an individual abandonment where an informed decison on pending environmental issues cannot be made prior to the

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[187] Docket No. AB-19 (Sub-No. 112), *The Baltimore and Ohio Railroad Company, Metropolitan Southern Railroad Company and Washington and Western Maryland Railway Company—Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia* (not printed), served April 14, 1988.

[188] *Ibid.*, served August 17, 1988.

[189] *Ibid.*, served August 29, 1988.

[190] See, e.g., No. AB-284 (Sub-No. 1X), *Iowa Northern Railway Company—Abandonment—In Blackhawk County, IA* (not printed), served April 1, 1988.

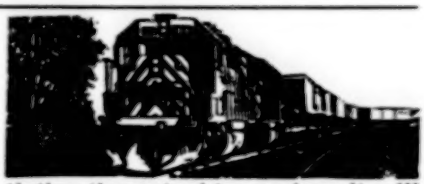
[191] 49 CFR 1105.

[192] See, e.g., No. AB-55 (Sub-No. 234X), *CSX Transportation, Inc.—Abandonment Exemption—Cobb, Paulding, and Polk Counties, GA* (not printed), served April 14, 1988.

[193] 16 U.S.C. 470f. For an explanation of the National Historic Preservation Act, see the "Energy and Environment" section of this chapter.

[194] Ex Parte No. 274 (Sub-No. 8), *Exemption of Out of Service Rail Lines* (not printed), served December 29, 1987.

[195] *Exemption of Out of Service Rail Lines*, 4 I.C.C.2d 400 (1988).



time the exemption authority would otherwise become effective. Petitions for stay will still be required for nonenvironmental concerns. A rulemaking proceeding was subsequently instituted to codify this policy,[196] and a final decision was pending at the end of the fiscal year.

The Commission also found that, in abandonment proceedings, the appropriate rate of return to be used in calculating a railroad's opportunity cost, or other return on investment where the real pre-tax cost of capital is prescribed as the rate of return, is 12.6 percent.[197] The rate-of-return figure is adjusted periodically to reflect the most recent cost-of-capital determination by the Commission. This decision updated the adequate rate of return based on the Commission's 1987 cost-of-capital determination.[198] An earlier decision,[199] which updated the adequate rate of return to 14.5 percent based on the 1986 cost of capital determination, was released towards the end of the last fiscal year.[200]

Another proposed adjustment would change the way property taxes are treated in abandonment proceedings to ensure that a railroad recovers property taxes as an avoidable cost only if it experiences an actual decrease in its overall property tax liability following abandonment. The Commission has requested comments on whether to require an abandoning carrier that is arguing that a savings would occur to submit evidence substantiating the actual tax savings it will experience.[201]

Rail Labor Issues

An issue that dominated the railroad industry during the past fiscal year was the relationship of the industry to its employees, and labor-relations considerations had a significant impact on the Commission's activities. As noted in the "Acquisitions and Operations" and "Short Line Railroads" sections of this chapter, the Commission's policy of imposing labor protection only in cases of exceptional circumstances on short line sales to encourage the development of regional and short line railroads has stimulated widespread controversy, both before the Commission and in the courts. In addition, the Commission applied the standards it had established for the review of arbitrator-adjudicated disputes arising out of labor-protective conditions imposed by the Commission under its authority at 49 U.S.C. 10907.

The Commission also addressed the scope and interpretation of its statutory mandate to impose labor-protective conditions under Section 10907. It did so in addressing requests to expand labor protection in mergers and acquisitions and, in one of its most significant decisions in the labor area, the Commission expanded the labor-protective conditions imposed according to its class exemption for intercorporate transactions when Guilford Transportation Industries, Inc., shifted rail operatons from three of its carriers to a fourth under circumstances that required that affected employees receive increased protection.[202]

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[196] Ex Parte No. 274 (Sub-No. 8), *Exemption of Out of Service Rail Lines* (not printed), served June 30, 1988.

[197] Ex Parte No. 274 (Sub-No. 3F), *Abandonment of R. Lines—Use of Opportunity Costs*, _____ I.C.C.2d _____ (1988), served August 17, 1988.

[198] *Railroad Cost of Capital—1987*, 4 I.C.C.2d 621 (1988).

[199] *Abandonment of Rail Lines—Use of Opportunity Costs*, 4 I.C.C.2d 92 (1987).

[200] *Railroad Cost of Capital—1986*, 3 I.C.C.2d 948 (1987).

[201] Ex Parte No. 274 (Sub-No. 20), *Rail Abandonment—Avoidability of Property Tax Expense Under the Unit Method of Assessment* (not printed), served September 15, 1988.

[202] *D&H Ry.—Lease & Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322 (1988).

In its role of reviewing arbitrators' decisions, the Commission decided four petitions during fiscal year 1988. One decision prompted a petition for reconsideration which was pending at the end of the year.[203] In addition, eight cases involving petitions for review of arbitration decisions were filed during the year and remained pending at year's end. In little more than 12 months' time, the Commission had been asked to decide more than a dozen appeals that it had never entertained before.

In fiscal year 1987, the Commission made its landmark decision in the *Lace Curtain* case.[204] In that decision, the Commission stated that it would review the merits of decisions of arbitrator-decided claims made according to employee-protective conditions to determine whether arbitrators' decisions were based on proper interpretations of the Commission's conditions, or whether arbitrators had acted within the scope of this authority. In its first decision following the *Lace Curtain* ruling, the Commission reversed an arbitrator's finding that employees were entitled to the benefits of the protective conditions for post-transaction job changes.[205] The Commission found that the dismissal of employees did not stem from the acquisition transaction in which the conditions were imposed. Rather, layoffs arose out of a severe downturn in the demand for the services of the involved railroad. The Commission concluded that the benefits of the protective conditions did not extend to these employees.[206] The employees' appeal of that decision is pending.

In a second case, the American Train Dispatcher's Association (ATDA) appealed a decision of an arbitrator who had approved a provision of a Commission plan offered by the Norfolk Southern Corporation to implement one aspect of a merger between the Southern Railway Company and the Norfolk and Western Railway Company. At issue was the assignment of former Southern and Norfolk and Western locomotive engineers on the merged system, and the transfer of jobs from Roanoke, Virginia, to Atlanta, Georgia. The Commission held that the aribitrator had been correct in concluding that ATDA had sought a level of labor protection in its claim in excess of that provided by the *New York Dock*[207] labor-protective conditions the Commission had imposed on the merger.[208]

Another case decided during the year involved an appeal filed by the Burlington Northern Railroad Company (BN) from a decision by an arbitration panel known as a "Special Board of Adjustment."[209] In that case, the Commission found that the Board had used an improperly broad standard in concluding that an employee adversely affected by the sale of a line of railroad qualified for labor protection under

[203]Finance Docket No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Tooele Valley Railroad Company* (not printed), served March 2, 1988.

[204]*Chicago & Northwestern Transportation Company—Abandonment—Near Dubuque and Oelwein, IA*, 3 I.C.C.2d 729 (1987).

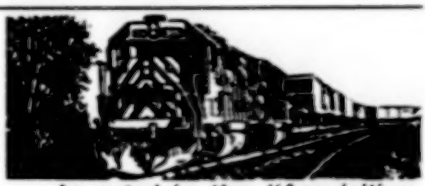
[205]Finance Docket No. 28490 (Sub-No.1), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Toole Valley Railroad Company* (not printed), served March 2, 1988.

[206]See footnote 205, *supra*.

[207]*New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

[208]Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company* (not printed), served June 10, 1988.

[209]Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company (Petition for Review of Arbitral Award)* (not printed), served June 23, 1988.



conditions imposed in a BN/St. Louis-San Francisco Railway Company merger transaction consummated some six years earlier. In reaching its decision, the Commission noted that its prior rulings had been ignored or rejected by the Board. The Commission emphasized that there must be a reasonably direct casual connection between the original merger transaction and the post-transaction job displacement that had occurred. The Board was found to have used a "but for" test to find that adversely affected employees would not have lost their positions but for the merger six years earlier. The Commission found that the layoffs at issue had been directly caused by factors that had arisen since the merger.

The fourth arbitration appeal the Commission decided during the year involved an arbitration award to a group of CSX Transportation, Inc., employees who had been required to move from Waycross to Raceland, Georgia, when CSX closed a shop at Waycross as part of its implementation of the merger of the Chessie system with CSX and the Family Lines.[210] The Commission partially reversed and remanded to an arbitration committee a decision prescribing an implementing agreement which had imposed a substantial and possibly insurmountable obstacle to the implementation of the shop closing. The committee was found to have directed the adoption of an implementing agreement transferring work assignments to the repair facility at Raceland which prohibited the reassignment of certain employees to the new location, and which prevented the relocation from producing any efficiency.

As noted in the "Acquisition, Operation and Construction" and "Short Line Railroads" sections of this chapter, the exercise of the Commission's discretion to impose labor protection in transactions involving short line sales to noncarriers is a recurring issue. The Commission has adopted a policy of refraining from imposing labor-protective conditions on the buying and selling entity in such transactions, absent a showing of exceptional circumstances.

In two separate proceedings remanded to the Commission by the U.S. Court of Appeals for the Ninth Circuit to determine whether labor protection should be imposed on selling carriers, the Commission found no showing of exceptional circumstances and concluded that the overall public interest did not support the imposition of labor-protective conditions on sellers.[211]

In an exemption proceeding in which it had previously indicated that job jeopardy *per se*, did not warrant the imposition of labor protection, the Commission declined to reopen the case on the basis of evidence relating to assurances given by a seller to former Penn Central employees 11 years previously.[212] While noting that relief may be available to affected employees through other channels, the Commission concluded that what had occurred 11 years ago was not relevant to the exemption, and that no

[210] *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988).

[211] Finance Docket No. 30555, *Northwestern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption from 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988, and Finance Docket No. 30457, *San Diego & Imperial Valley Railroad Company, Inc.—Exemption from 49 U.S.C. 10901 and 11301* (not printed), served July 27, 1988.

[212] Finance Docket No. 31059 *Central Michigan Railway Company—Acquisition and Operation—Certain Lines of Grand Trunk Western Railroad Company*, and Finance Docket No. 31061, *The Straits Corporation—Exemption from 49 U.S.C. 11343* (not printed), served December 10, 1987.

new exceptional circumstances on which to base the imposition of labor protection had been proven.

A number of rail line acquisition exemptions filed under the Commission's class-exemption procedures were the subject of petitions to revoke seeking the imposition of labor-protective conditions during the past fiscal year. Various petitioners failed to show exceptional circumstances to justify the imposition of conditions requiring labor protection, and the Commission therefore denied the relief sought.[213]

In response to a petition for clarification, the Commission expressed its views with regard to labor issues arising out of the formation of short line railroads.[214] It reviewed its policy of declining to impose labor protection when exempting the sale of a short line or regional railroads from regulation. The Commission pointed out in this case that in an exempt transaction, the ICC retains the ability to impose labor-protective conditions by means of partially revoking an exemption, although it noted that such action would be taken only when exceptional circumstances are shown. Exceptional circumstances, the Commission explained, include situations in which Commission rules or precedent were misused; where existing contracts specify that line sales are subject to procedural or substantive protection; and where injury to labor can be demonstrated to be unique, disproportionate to the gains achieved for a local transport system, and for which compensation may be made without causing termination of the transaction at issue. The Commission also expressed the opinion that its actions under the Interstate Commerce Act pre-empt the Railway Labor Act to the extent necessary to allow parties to consummate a transaction previously authorized by the Commission.[215]

The pre-emption issue has been raised and considered in a number of court decisions. In a proceeding arising out of a short-line transfer processed under the Commission's class-exemption procedures, the U.S. Court of Appeals for the Third Circuit held that a district court had no jurisdiction to enjoin a strike taken to block a Commission-approved sale.[216] It remanded that case for further proceedings. The Court held that the strong national policy embodied in the Norris-

[213]Finance Docket No. 30860, *Kyle Railroad Company—Exemption Acquisition and Trackage Rights—Missouri Pacific Railroad Company* (not printed), served March 23, 1988; Finance Docket No. 31094, *Grainbelt Corporation—Acquisition and Operation Exemption—Burlington Northern Railroad Company* (not printed), served February 2, 1988; Finance Docket No. 31113, *TP&W Acquisition Corporation—Exemption Acquisition and Operation—Certain Lines of The Atchison Topeka and Santa Fe Railway Company* (not printed), served November 9, 1987; Finance Docket No. 31168 *Little Kanawah River Rail, Inc.—Acquisition and Operation Exemption—CSX Transportation, Inc. Line in Wood County, WV* (not printed), served April 13, 1988; Finance Docket No. 31185, *Leadville-Climax Shortline Railway Company—Acquisition and Operation Exemption—Rail Lines of Burlington Northern Railroad Company* (not printed), served April 6, 1988; Finance Docket No. 31189, *Mid-Michigan Railroad, Inc.—Acquisition and Operation Exemption—CSX Transportation, Inc.* (not printed), served April 12, 1988; Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company* (not printed), served May 26, 1988; and Finance Docket No. 31102, *Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company* (not printed), served July 28, 1988.

[214]Finance Docket No. 31205, *FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company* (not printed), served January 29, 1988.

[215]Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification* (not printed), served January 29, 1988.

[216]*BLEA v. P&LE*, 831 F.2d 1231 (3rd Cir. 1987).

LaGuardia Act[217] was not to be subordinated to this Commission's authority to approve or exernpt a transfer of railroad property.[218] In an appeal from the district court's decision on remand, the Third Circuit affirmed the district court's determination, and concluded that the Commission's approval of the transaction without the imposition of substantive labor-protective conditions did not relieve the railroad of its obligation to comply with the requirements of the Railway Labor Act.[219]

The U.S. Court of Appeals for the Eighth Circuit has disagreed with the Third Circuit's view of the pre-emption issue, holding that the ICC's labor-protection procedures under Section 10901 of the Interstate Commerce Act do supersede the application of Railway Labor Act bargaining procedures to labor-protection disputes in exemption transactions.[220] Nonetheless, the Eighth Circuit held that Section 10901 procedures that substitute for the Railway Labor Act in these sales do not merit accommodation of the Norris-LaGuardia Act (even though the Railway Labor Act procedures would), and thus agreed with the Third Circuit that the Interstate Commerce Act cannot provide the basis for a Federal court injunction against a strike over a Section 10901 transaction. The Fifth Circuit has recently adopted the Third Circuit's view on the pre-emption and status quo questions.[221]

The parties in the *Pittsburgh & Lake Erie* and *Chicago and Northwestern Transportation Company* cases have joined with the ICC in asking the Supreme Court to grant review of the Interstate Commerce Act issues, and the parties in the *City of Galveston* case[222] plan to petition for review in fiscal year 1989. The Supreme Court has asked for the Solicitor General's views as to whether review should be granted in the *Pittsburgh & Lake Erie* cases, which together present all the Interstate Commerce Act issues.

Another labor issue considered by the Commission concerned the availability of labor-protective benefits to employees of a motor carrier subsidiary of a rail merger participant. In *Cosby* v. *I.C.C.*,[223] the U.S. Court of Appeals for the Eighth Circuit determined, on the basis of factual and equitable considerations, that employees of a particular motor carrier subsidiary were "railroad employees" entitled to the same labor-protective benefits as were extended to other railroad employees of the merger participant. Based on the same equitable considerations that were present in *Cosby*, that is, assurances by officials of the merger participants that employees of involved carrier subsidiaries would be entitled to protective benefits in the unlikely event that they were adversely affected by the merger transaction, the Commission found employees of a particular motor carrier subsidiary to be a class of employees entitled to the level of protection authorized in the *New York Dock*

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[217] 29 U.S.C. 108.

[218] This decision has been followed by a Missouri Federal district court. *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987.

[219] *Railway Labor Executives' Association* v. *Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420 (3rd Cir. 1988).

[220] *RLEA* v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (8th Cir. 1988), and *UTU* v. *Burlington Northern R.R.*, 848 F.2d 856 (8th Cir. 1988).

[221] *RLEA* v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988).

[222] *Ibid.*

[223] *Cosby* v. *I.C.C.*, 741 F.2d 1077 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985).

case.[224] The Commission advised that the resolution of factual disputes over individual claims to benefits was to be by binding arbitration.[225]

In an investigation into a series of lease-and-trackage-rights transactions within a corporate family involving use of the Commission's notice-of-exemption procedures, the Commission found that the collective implementation of such transactions by a parent company had so restructured operations as to substantially injure railroad employees.[226] In a precedent-setting decision, the Commission imposed extraordinary labor-protective conditions requiring the negotiation of an implementing agreement and, if necessary, binding arbitration. The purpose of the Commission's action was to ensure fair treatment for employees adversely affected by the transactions or improperly advised by carriers of the protective benefits to which they were entitled. Negotiations failed, an arbitrator issued his decision, and consistent with the Commission's prior decision to review the arbitrator's conclusion, an appeal to that decision was under expedited consideration at the close of the year.

The Commission, in interpreting the labor-protective conditions imposed in the *Northern Lines*[227] case, which included a guaranteed minimum level of compensation for the working life of all affected union and nonunion employees, determined the minimum salary due a particular nonunion employee whose job had been abolished.[228] In an earlier decision, the Commission had determined that the Burlington Northern Railroad Company (BN) had breached the *Northern Lines* conditions with regard to a nonunion employee, in that BN had failed to provide him with the level of guaranteed compensation contemplated by the conditions.[229] The Commission's latest decision developed a method for determining the minimum level of compensation due under the *Northern Lines* conditions consistent with the prior decision, and applicable for the resolution of issues of this type affecting hundreds of similiarly situated nonunion BN employees.[230] This approach was used by the Commission in the disposition of several other proceedings involving similarly situated, nonunion, BN employees.[231]

The Commission reopened a proceeding in which it had initially declined to impose employee-protective conditions in exempting from regulation what it determined to be an entire line abandonment.[232]

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[224] *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

[225] Finance Docket No. 28583 (Sub-No. 1), *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company* (in decisions not printed), served November 13, 1987 and July 8, 1988.

[226] *D&H Ry.—Lease & Trackage Rights Exempt. Springfield Term.*, 4 I.C.C.2d 322 (1988). This case is also treated under the "Mergers and Consolidations" section of this chapter.

[227] *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967).

[228] Finance Docket No. 21478 (Sub-No. 6), *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway* (not printed), served April 5, 1988.

[229] *Ibid.*, served December 16, 1986.

[230] See Footnote 229, supra.

[231] Finance Docket No. 21478 (Sub-No. 8), *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway; In the Matter of Mary Dean et al.* (not printed), served April 5, 1988; Finance Docket No. 21478 (Sub-No. 9), *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway; In the Matter of Charles A. Barr et al.* (not printed), served April 5, 1988; and Finance Docket No. 21478 (Sub-No. 10), *Lauven B. Johnson* v. *Burlington Northern Railroad Company* (not printed), served May 13, 1988.

[232] Docket No. AB-160 (Sub-No. 5X), *Montour Railroad Company—Abandonment Exemption—In Allegheny and Washington Counties, PA* (not printed), served March 29, 1988.

Based on additional evidentiary submissions, the Commission concluded that the operations of a railroad proposing an abandonment were so integrally linked with those of its parent—itself an operating railroad—as to preclude a finding, for labor-protective purposes, that the carrier proposing the abandonment was operated as a separate railroad. The Commission modified an earlier finding, determined the proposed transaction to be a partial line abandonment, and imposed labor-protective conditions.

Finally, the Commission was asked to revoke a class exemption applicable to BN's negotiated trackage rights with its subsidiary, the Winona Bridge Railway Company (WB) to conduct bridge movements from Seattle, Washington, to Winona Junction, Wisconsin, a distance of 1,860 miles.[233] A U.S. District Court has enjoined BN from initiating operations with WB until BN has exhausted the mandatory collective-bargaining provisions of the Railway Labor Act.[234] A petition for revocation was pending before the Commission at the end of the fiscal year.

An administrative appeal was filed in one case[235] concerning imposition of the more stringent *New York Dock* labor-protective conditions, together with seven other related cases filed during the year.[236]

Short Line and Regional Railroads

The Commission continued to encourage the entry of new regional or local railroads. The purpose of this policy is to promote the retention of rail service under lines that are either unprofitable or minimally profitable when operated by the trunk line carriers. These new firms tailor their operations to regional or local needs and often bring new vitality, new marketing, and new management ideas to the operation of a railroad, and may provide substantial rehabilitation to lines that have been allowed to deteriorate. Smaller carriers often can operate marginal lines more flexibly, efficiently, and profitably than can trunk line carriers. In many cases, short line and regional operations are the only alternative to abandonment and the consequent loss of rail service.

As noted earlier in this chapter under "Acquisitions and Operations," following court decisions in *RLEA* v. *Pittsburgh and Lake Erie Railroad*[237], the number of short line acquisitions came nearly to a halt. In contrast, during the first quarter

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[233]Finance Docket No. 31163, *Winona Bridge Railway Company—Trackage Rights—Burlington Northern Railroad Company* (in decisions not printed), served December 4, 1987, January 7 and March 7, 1988.

[234]*Burlington Northern R.R. Co.* v. *United Transportation Union* (unpublished), No. 88-C-2687 (N.D. Ill. June 13, 1988).

[235]Finance Docket No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Tooele Valley Railroad Company* (not printed), served March 2, 1988.

[236]Finance Docket No. 28490 (Sub-No. 2), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company and Tooele Valley Railroad Company*; Finance Docket No. 29720 (Sub-No. 1A), *Guilford Transportation Industries, Inc.—Control—Boston and Maine Corporation* and Finance Docket No. 29772, *Guilford Transportation Industries, Inc.—Control—Delaware and Hudson Railway Company*; Finance Docket No. 30582 (Sub-No. 2), *Norfolk and Western Ry. Co. et al.—Contract to Operate and Trackage Rights*; Section 5b Application No. 2, *Western Railroads—Agreement*; Finance Docket No. 30000 (Sub-No. 47), *Kendall Caputo et al. v. Union Pacific Railroad Co.*; and Finance Docket No. 30965 (Sub-No. 1), *Delaware & Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway, Review of Arbitral Award.*

[237]*Railway Labor Executives' Association* v. *Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420 (3rd Cir. 1988).

of fiscal year 1988, industry growth flourished. Using expedited procedures under class-exemption rules at 49 CFR 1150.31, the Commission authorized 20 new short line and regional railroads to begin operations during the first quarter, compared to 51 such authorizations during all of fiscal year 1987. The most common transactions involved the sale of marginal lines by Class I carriers to new corporate entities.

The early success of class exemptions for new carriers led to several transactions of greater size late in the past fiscal year. One involved the sale of all 182 miles of the Pittsburgh & Lake Erie Railroad Company's main and branch lines.[238] Three sales involved 830[239], 1,800[240], and 369[241] miles of rail line, respectively, with additional trackage rights to operate over other carrier lines. Such changes in the size of acquisitions processed under class-exemption procedures prompted the Commission to examine whether existing procedures provided affected parties with adequate notice and opportunity to comment. Following the receipt of public comments, the Commission revised its rules to require advance notice of intent to file, a longer waiting period for an exemption to become effective, and procedures for staying an exemption's effectiveness when a purchaser would become a Class I or Class II carrier.[242]

An important element in encouraging new operators to enter into the railroad industry has been the Commission's policy to impose labor-protective conditions only upon a showing of exceptional circumstances. Imposition of these conditions is discretionary and the Commission's policy routinely has been not to burden new operators with additional costs that would cause the failure of new companies. Labor interests have opposed this policy.

The Commission issued a declaratory order asserting the exclusive and plenary nature of its jurisdiction over consolidations, sales, and abandonments.[243] As noted in "Acquisitions and Operations" and "Rail Labor Issues," conflicting decisions over the extent of the Commission's authority were reached by the courts. An appellate court reversed a district court's injunction against a strike, concluding that the Commission's jurisdiction did not supercede labor's rights under the Norris-LaGuardia Act.[244] It also held that disagreement over the proposed *P&LE Railco*[245] transaction was a major dispute within the meaning of the Railway Labor Act (RLA), and that the Commission has no authority to override the RLA's requirement that dispute resolution procedures be completed before a sale takes place.[246] Subse-

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[238]Finance Docket No. 31121, *P&LE Railco, Inc.—Exemption Acquisition and Operation—Lines of The Pittsburgh and Lake Erie Railroad Company and The Youngstown and Southern Railway Company* (not printed), served September 19, 1987.

[239]Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of Burlington Northern Railroad Company* (not printed), served July 24, 1987.

[240]Finance Docket No. 31102, *Wisconsin Central Ltd.—Exemption Acquisiton and Operation—Certain Lines of Soo Line Railroad Company* (not printed) served September 4, 1987.

[241]Finance Docket No. 31116, *Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania* (not printed) served September 22, 1987.

[242]*Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 4 I.C.C.2d 309 (1988).

[243]Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification* (not printed), served January 29, 1988.

[244]*Railway Labor Exec. v. Pittsburgh & Lake Erie R.*, 831 F.2d 1231 (3rd Cir. 1987).

[245]See footnote 240, supra.

[246]*RLEA v. Pittsburgh & Lake Erie R.*, 677 F. Supp. 830 (1987); *aff'd*, 845 F.2d 420 (3rd Cir. 1988).

quently, another circuit court of appeals took a similar position,[247] while still another held that the Interstate Commerce Act superceded the major dispute procedures of the RLA, but that the Norris-LaGuardia Act bars injunctions against strikes.[248] (See also "Rail Labor Issues.") Several related petitions seeking review by the Supreme Court were pending as the fiscal year came to a close.

At the end of fiscal year 1988, some small line sales under the class-exemption rules were being filed. It appears that in most of these cases labor interests had been privately accommodated. Larger transactions, however, were not being proposed under the class-exemption rules, and many negotiations for line sales were held in abeyance pending action by the Supreme Court.

The Commission's Office of Transportation Analysis, in conjunction with the Federal Railroad Administration, is continuing its survey of the users of 76 short line and regional railroads. This study will, among other things, assess improvements in service by new carriers. During the year, the Commission's Office of Public Assistance began to revise an ICC booklet entitled *Guidelines for Evaluating the Feasibility of Short Line Operations.* The revised publication, newly titled *Before You Start A Small Railroad: A Brief Overview of Things to Consider*, will be available to the public in fiscal year 1989.

Freight Car Service

Surpluses of railroad-controlled freight cars continued to decline in fiscal year 1988. The daily average surplus at the end of September 1987 was 50,780 cars, and that figure dropped to an average of 35,960 cars by the end of September 1988, for a daily average during the ing the fiscal-year period of 42,859 cars. This decline resulted principally from the reduced ownership of railroad equipment. For example, on October 1, 1987, Class I railroads reported a combined fleet ownership of 758,629 cars, but by October 1, 1988, that ownership level had dropped to 725,561 cars. This was a net reduction in the combined fleet of 33,068 cars, which is the difference between the number of cars installed (1,622) and the number of cars retired or otherwise lost from the control of the Class I carriers (34,690).

On September 30, 1988, the entire rail car fleet of Classes I, II, and III railroads, private car companies, and shippers consisted of 1,251,578 cars, an overall net reduction of 46,290 cars from the prior fiscal year. This figure reflects the overall reduction in rail-car equipment by all contributors to the rail-car fleet.

The average carrying capacity of a freight car placed into rail service during fiscal year 1988 was 93 net tons, an increase of two net tons over per-car tonnage figures registered 10 years ago. While the aggregate carrying capacity of cars installed was 150,846 net tons, there was an aggregate capacity loss of 1,942,270 net tons owing to the retirement of cars accounting for 2,093,116 net tons capacity.

Fiscal year 1988 freight-car loadings totaled 21,959,165, an increase of 1,681,312 cars over the fiscal year 1987 car loading total of 20,277,853. Relative to individual commodity loadings, coal ranked first with 6,190,287 coal-loaded cars, an increase of 502,908 cars over the 5,687,379 cars loaded in fiscal year

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[247] *Railway Labor Executives Ass'n* v. *Galveston, Tex.*, 849 F.2d 145 (1988).

[248] *Burlington Northern R. Co.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988).

1987. Cars carrying grain ranked second in total loadings with 1,626,531 cars, up from the 1987 loading figure of 1,484,369 cars. The third heaviest commodity loadings were chemicals and allied products, with 1,412,065 cars during the reporting period, or 82,980 carloads over the 1,329,085 cars loaded in fiscal year 1987. Car loadings of motor vehicles and equipment increased by 52,973, from 971,438 cars in fiscal year 1987 to 1,024,411 cars in fiscal year 1988.

Overall, car loadings increased approximately 8 percent in fiscal year 1988 over 1987. Coal accounted for 28.1 percent of all cars loaded. The greatest percentage increase in fiscal year car loadings—9.6 percent—occurred in the loading of grain, followed by an 8.8-percent increase in coal loading, with chemicals and allied products registering a 6.2-percent increase in cars loaded. Last fiscal year saw a 5.5-percent increase in cars loaded with motor vehicles and equipment over fiscal year 1987.

Regarding trailer-on-flat-car service, in fiscal year 1988 there were 3,279,473 flatcars loaded with 5,636,717 trailers/containers, a 6.6-percent increase over fiscal year 1987's total of 3,076,415 similarly loaded flatcars transporting trailer/containers.

The locomotive ownership of Class I railroads on October 1, 1987, consisted of a total of 20,012 units, while on October 1, 1988, such ownership was down to 19,894 units, a 118-unit reduction. At the end of fiscal year 1988, Class I railroads had 73 multipurpose locomotives on order.

During the past fiscal year, the Commission issued one emergency rerouting order in the furtherance of railroad operations.

Passenger Service

In a vigorously contested case, the Commission for the first time exercised its authority under Section 402(d) of the Rail Passenger Service Act[249] to compel a railroad to sell one of its lines to the National Rail Passenger Corporation (Amtrak).[250] The issue here was complicated by the fact that Amtrak, rather than retaining ownership of a line at issue, proposed to sell it to another railroad and to reserve trackage rights to perform its operations. Amtrak also requested that a 48.8-mile segment of the Connecticut River Line and certain other property interests belonging to the Boston and Maine Corporation (B&M) be conveyed to it. Central Vermont Railway, Inc. (CV), filed a petition for exemption[251] to allow CV to acquire the line following the proposal transfer to Amtrak. Under an expedited schedule that accommodated Amtrak's interest in quickly rehabilitating the line, the Commission granted Amtrak's application and CV's exemption request subject to historic-preservation and employee-protective conditions. Compensation for the line was set at $2,373,286, the going-concern value. B&M was granted the right to obtain trackage rights over the line with a $75,000 per annum rental ceiling.[252] The Commission subsequently denied B&M's petition for a stay

[249] 45 U.S.C. 501, *et seq.*

[250] *Finance Docket No. 31250, National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire* (not printed), served April 29, 1988.

[251] Finance Docket No. 31259, *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation*, filed April 7, 1988.

[252] *Amtrak Convey. B&M Conn River Line in VT & NH*, 4 I.C.C.2d 761 (1988).

pending judicial review,[253] and B&M's request for an emergency stay was denied by the U.S. Court of Appeals for the D.C. Circuit.[254]

In another contested case, according to a request for a declaratory order, the Commission asserted its jurisdiction over the intrastate passenger operations of a railroad conducting both freight and passenger operations over a 21-mile line in the Napa Valley in California, a state that has not obtained Federal certification to regulate intrastate rail transportation.[255] A number of residents and local governmental bodies in the Napa Valley had invoked state law to prevent a tourist and freight railroad, the Napa Valley Wine Train, from operating in the valley. The Commission asserted jurisdiction and upheld the Wine Train's right to operate the line, which it acquired from the Southern Pacific Railroad under the forced-sale provisions of 49 U.S.C. 10905. The Public Utilities Commission of the State of California has sought judicial review of the Commission's decision, and the matter was pending at the close of the fiscal year.[256]

In other passenger-related matters arising during the past fiscal year under the Rail Passenger Service Act,[257] the Commission resolved a number of operational problems between Amtrak and other railroads. The Commission granted applications to provide Amtrak with access over: (1) the Chicago & Western Indiana Railroad Company's lines and those of the Belt Railway Company of Chicago for Amtrak's intercity passenger trains in Chicago, Illinois;[258] (2) the Boston and Maine Corporation Lines between Springfield and East Northfield, Massachusetts, for emergency operation[259] of two hi-rail inspection vehicles;[260] and (3) Wisconsin Central Ltd. lines for two special, round-trip passenger trains to an air show at the Oshkosh Airport, Oshkosh, Wisconsin.[261] The Commission also instituted a proceeding to determine just and reasonable compensation for the Oshkosh Airport trip.[262] Another Amtrak proceeding to set compensation was dismissed without prejudice upon the Commission's finding that it was premature to resolve whether the Soo Line Railroad was entitled to additional compensation as a self-insurer for any added liability exposure from Amtrak's presence on its line.[263]

Amtrak, the Long Island Rail Road Company, and the Metropolitan Transportation Authority of New York City also sought approval or exemption for the redevelopment

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[253]Finance Docket No. 31250, *National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire*, and Finance Docket No. 31259, *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation* (not printed), served August 23, 1988.

[254]*Boston and Maine Corporation* v. *ICC*, No. 88-1631 (D.C. Cir. Aug. 31, 1988).

[255]*Napa Valley Wine Train, Inc.—Pet. for Declaratory Order*, 4 I.C.C.2d 720 (1988).

[256]*The Public Utilities Commission of the State of California* v. *ICC*, No. 88-1650 (D.C. Cir., filed Sept. 2, 1988).

[257]45 U.S.C. 501 *et seq.*

[258]Finance Docket No. 31204, *Amtrak and Chicago & Western Indiana Railroad Company and the Belt Railway Company of Chicago—Use of Tracks and Facilities and Establishing Just Compensation* (not printed), served March 18, 188.

[259]See 45 U.S.C. 402(c).

[260]Finance Docket No. 31257, *Amtrak and Boston and Main Corporation—Use of Tracks and Facilities and Establishing Just Compensation* (not printed), served April 8, 1988.

[261]Finance Docket No. 31306, *Amtrak and Wisconsin Central Ltd.—Use of Tracks and Facilities and Establishing Just Compensation* (not printed), served July 29, 1988.

[262]*Ibid.*

[263]Finance Docket No. 31062, *Amtrak and Soo Line Railroad—Use of Tracks and Facilities and Establishing Just Compensation* (not printed), served April 15, 1988.

of Pennsylvania Station, a new rail control center, and related track control improvements to the tracks and tunnels leading into the station. The Commission declined to assert its jurisdiction, and found that the proposals were exempt by statute from Commission review.[264]

Designated agents of the Commission's Office of Compliance and Consumer Assistance issued five emergency orders under 45 U.S.C. 562(c) to prevent rail passenger service interruptions and granted permission to Amtrak passenger trains to use alternative routes to reach their destinations. Such orders are issued whenever a railroad company operating an Amtrak train cannot move a train over its normal route and an alternative route exists over the lines of another carrier.

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[264]Finance Docket No. 23957 (Sub-No. 1), *Amtrak, MTA and LIRR—Petition for Exemption of Joint Venture*, and Finance Docket No. 23957 (Sub-No. 2), *Amtrak and LIRR—Petition for Exemption Of Joint Facility Agreement* (not printed), served July 28, 1988.

TRUCKING COMPANIES

General Financial Condition

Commission data for 100 of the nation's largest motor carriers of property for the twelve months ending June 30, 1988, and June 30, 1987, show that operating revenues rose 6.8 percent, to almost $18.3 billion, and revenue tons hauled increased 5.6 percent. Net carrier operating income fell 32 percent, to $546.9 million, and net income declined 41.1 percent, to $262.2 million. Consequently, the composite operating ratio (the ratio of operating expenses to operating revenues) unfavorably rose to 97 percent from 95.3 percent. The rate of return on shareholders' equity for these 100 carriers declined to 6.59 percent from 11.78 percent.

Increased costs, which were not offset adequately by rate adjustments, and continued strong rate competition and discounting are the primary causes for the industry's substantial decline in earnings during fiscal year 1988.

Mergers and Unifications

The Commission instituted a proceeding which revised its rules at 49 CFR Part 1181 concerning the procedures that enable motor passenger and property carriers, water carriers, property brokers, and household goods freight forwarders to obtain approval to merge, transfer, or lease their operating rights in financial transactions not subject to 49 U.S.C. 11343.[1] Transactions covered by the rules are those governed by 49 U.S.C. 10321 and 10926. In that same proceeding, the Commission amended its regulations at 49 CFR Parts 1181 and 1186, respectively, to make safety fitness a substantive issue for the Commission's consideration in deciding whether to approve transfer under 49 U.S.C. 10926, or to grant exemptions under 49 U.S.C. 11343(e) for the purchase of motor carrier authority. (For further discussion of safety fitness considerations under the amended regulations, see the discussion of "Safety" within this chapter.) Also in that proceeding, the Commission modified its name-change procedures by broadening the category of transactions covered by these rules.

The Commission's goal in revising its regulations was principally to expedite and reduce the filing requirements for such transactions, and to create a small-carrier transfer decisional framework that reflects the Commission's current policies dealing with carrier and broker licensing. The Commission concluded that the adoption of simplified, uniform standards and filing requirements would benefit the public, individual parties, and the Commission itself in the promotion of the goals of the national transportation policy.

During the fiscal year, 237 proceedings were initiated under the Commission's exemption regulations, and more than 600 small motor-property transactions were filed under the governing regulations.

In a significant proceeding involving a formal application under 49 U.S.C. 11344, the Commission approved the acquisition of control of a motor carrier by North American Van Lines, Inc., a subsidiary of a noncarrier holding company, the Norfolk Southern Corporation (which controls two rail carriers).[2] (For a further discussion of this proceeding, see "Intermodal Transportation").

[1] Ex Parte No. MC-111 (Sub-No. 1), *Transfer Rules*, 4 I.C.C.2d 382 (1988).

[2] No. MC-F-17934 (Sub-No. 1), *Norfolk Southern Corporation and North American Van Lines, Inc.—Control—Tran-Star, Inc.* (not printed), served April 5, 1988.

The Commission regulates the pooling of traffic by motor carriers. Although competition is reduced or eliminated between or among pool participants, the benefits of pooling transactions may nevertheless outweigh their anticompetitive effects. Pooling frequently enables carriers to enter or remain in markets that they might not otherwise be able to serve, strengthens their ability to compete against other carriers or transportation modes, and offers the possibility of lower prices to shippers. In the past fiscal year, one motor property carrier pooling application was approved by the Commission.[3] Four motor passenger carrier pooling applications filed subsequent to approval of the GLI Acquisition Company (Greyhound)-Trailways Lines, Inc., merger were under consideration as the fiscal year came to an end.[4]

Rates

This fiscal year, the Commission issued decisions in numerous court-referred cases involving negotiated but unpublished rates according to its negotiated rates policy adopted in 1986[5] The Commission applied its previously enunciated decisional standards[6] to these cases and generally concluded that negotiated rates existed and that a carrier's collection of undercharges based on a filed tariff rate would be an unreasonable practice in violation of 49 U.S.C. 10701(a).[7] More than 30 negotiated rates cases were filed during the fiscal year, and some involved multiple shippers and millions of dollars in sought undercharges.[8]

A number of courts have declined to refer such undercharge cases to the Commission on the grounds that the Commission's negotiated rates policy is inconsistent with the statutory obligation to charge the filed rate.[9] More recently, other district courts that had been referring cases to the Commission have either vacated those referral orders or have declined to follow the findings of the Commission, holding that the courts are bound to a strict application of the "filed rate" doctrine until either Congress or the Supreme Court directs otherwise.[10] As a result, legislation has been proposed that would allow the Commission to craft a narrow exception to the "filed rate" doctrine by a rulemaking proceeding that would be binding on the courts.

In an effort to overcome judicial refusal to recognize an exception to the filed-rate doctrine, the National Industrial Transportation League

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[3]No. MC-F-18652, *Shippers Express, Inc.—Pooling—Texas Louisiana Cartage Incorporated* (not printed), served October 26, 1987, modified in No. MC-F-18652 (Sub-No. 1), *Shippers Express, Inc., and Texas Louisiana Cartage Incorporated—Pooling—Jackson, MS, Interchange* (not printed), served March 11, 1988.

[4]No. MC-F-19190, *Adirondack Transit Lines, Inc., and Pine Hill-Kingston Bus Corp.—Pooling—Greyhound Lines, Inc.* (not printed), notice served August 19, 1988; No. MC-F-19154, *Capitol Bus Company—Pooling—Greyhound Lines, Inc.* (not printed), notice served July 28, 1988; No. MC-F-18939, *Southeastern Trailways, Inc., and Deluxe Trailways, Inc.—Pooling—Greyhound Lines, Inc.* (not printed), notice served April 27, 1988; and No. MC-F-18917, *Carolina Trailways—Pooling—Greyhound Lines, Inc.* (not printed), notice served April 27, 1988.

[5]*NITL—Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986).

[6]See *Wakefern Food Corp. v. Southwest Frgt. Lines, Inc.*, 3 I.C.C.2d 814 (1987).

[7]See e.g., No. MC-C-10991, *Wakefern Food Corporation v. Southwest Freight Lines, Inc.* (not printed), served January 4, 1988.

[8]No. MC-C-30013, *A.J. Hollander, et al.—Petition for Declaratory Order* (not printed), served July 7, 1988, involved 32 shippers; No. MC-C-30034, *Don Fisher Sales Company, et al.—Petition for Declaratory Order* (not printed), served April 22, 1988, involved 7 shippers; and No. MC-C-30007, *Auto Specialties Manufacturing Company, et al.—Petition for Declaratory Order* (not printed), served February 22, 1988, involved 6 shippers.

[9]E.g., the North Carolina bankruptcy court handling the McLean Trucking Company bankruptcy involving about 1,800 undercharge claims.

[10]49 U.S.C. 10761(a).

petitioned the Commission for an order declaring that it is an unreasonable practice for a carrier to charge a negotiated, but unpublished, rate. The Commission published a notice seeking comments on that petition.[11] Comments were received, but, at the request of the parties, the proceeding was held in abeyance pending the outcome of the proposed legislation on the issue of negotiated rates. Shortly after the close of the fiscal year, the Commission was asked to proceed to a decision because legislation had not been obtained.

The Commission also has been requested by courts to consider other reasonable-practice issues involving provisions in filed tariffs. In one case, the Commission found that the application of certain bill-of-lading notation requirements was an unreasonable practice under 49 U.S.C. 10701(a)[12] Recently, a district court upheld this ruling in two other cases.[13] However, in one proceeding involving the transportation of governmental traffic, the Commission found the collection of undercharges not to be an unreasonable practice. Here, a shipper had failed to provide the documentation necessary to prove that it was entitled to the lower government-tender rate.[14]

In the area of discount rates, the Commission found that certain tariffs violated the provisions of 49 U.S.C. 10761 and 10762 because they provided no basis for shippers or competing carriers to determine the rates at issue or when the rates would apply.[15]

In a significant proceeding, the Commission amended its credit regulations, codified at 49 CFR part 1320, to allow carriers to assess reasonable collection-expense charges against shippers that fail to pay their freight bills on time.[16] The rules allow carriers, by tariff rule, to assess liquidated damages or, as an alternative, to require payment of full, nondiscounted rates instead of discount rates otherwise applicable. Under a third option, carriers, outside of their tariffs, may independently contract with shippers in bills of lading to recoup collection costs. The rules require that, under tariff-rule methods, the damages, timing, and conditions of the charges shall be clearly described in the tariff rule and shall be applied without unjust discrimination between similarly situated shippers.

All such tariff rules may be challenged on reasonableness grounds. The rules do not apply to aggregate "balance-due" claims sought for collection on past shipments by a bankruptcy trustee or other person or agent, or where there is a legitimate dispute regarding charges. Following the Commission's action in amending its credit regulations, the Household Goods Carriers' Bureau, Inc. (HGCB), filed a petition seeking the promulgation of regulations dealing with penalty charges for the nonpayment of freight bills covering the motor com-

[11]No. MC-C-30090, *National Industrial Transportation League—Petition for Declaratory Order on Negotiated Motor Carrier Rates* (not printed), served April 22, 1988.

[12]No. MC-C-30014, *Von Hoffman Press, Inc., et al. v. Orscheln Bros. Truck Lines, Barry S. Schermer, Trustee, et al.* (not printed), served December 8, 1987.

[13]*Carriers Traffic Service, Inc. v. Anderson, Clayton & Company, et al.*, U.S.D.C., N.D. IL, E.D., No. 85 C 8639; and *Inman Freight Systems, Inc., Jim S. Green, Trustee v. Boise Cascade Corp., et al.*, U.S.D.C., N.D. IL, E.D. No. 83 C 8968.

[14]No. MC-C-30043, *Sipi Metals Corp.—Petition for Declaratory Order* (not printed), served June 17, 1988.

[15]No. MC-C-10975, *Roadway Express, Inc. v. Consolidated Freightways Corporation of Delaware* (not printed), served December 14, 1987.

[16]*Payment of Rates & Charges—Penalty for Nonpayment*, 4 I.C.C.2d 340 (1988).

mon carrier transportation of household goods.[17] The HGCB recommends that a one-time service charge and a charge of 30 percent of a freight bill's amount should be allowed, and believes that this proposal would serve as a reasonable, maximum, liquidated-damages ceiling for the nonpayment of household goods freight bills. The HGCB's petition was under consideration at the end of fiscal year 1988.

In another rulemaking proceeding, the Commission reopened a case that had amended its collect-on-delivery (COD) shipment rules codified at 49 CFR 1052.[18] On reopening, the Commission adopted a requirement that carriers electing to provide COD service must publish and maintain tariffs that contain nondiscriminatory rules governing the collection and remittance of COD funds. Alternatively, carriers that do not wish to publish such tariffs may adopt a 15-day remittance period. The Commission also clarified the limits of permissive, collective COD activities.

In a proceeding involving "order-notify" bills of lading, the Commission generally affirmed its position that the publication in freight classifications of all rules and charges unrelated to classification (particularly an order-notify rule and accessorial charge) exceeds the appropriate scope of Section 5(a) agreements of motor freight classification publishers, and specifically those of the National Motor Freight Traffic Association (NMFTA).[19] The decision ordered the elimination of the rules and charges in the National Motor Freight Classification found offensive to this policy of preserving the essential distinction between ratemaking and classification. The removal of rules and rule-related charges from classification tariffs, the Commission held, would uphold the purpose of motor freight classification and, further, would enhance competition within the motor carrier industry. The Commission also discussed the necessity of separating classification and ratemaking functions when it ordered canceled certain tariff revisions proposed by the HGCB,[20] and subsequently highlighted this issue in the revised rate bureau agreement filed by the HGCB.[21] (See "Rate Bureaus," below, for a discussion of cases involving the related issue of exceptions to the statutory prohibition against collective single-line ratemaking.)

The Commission also found to be unreasonably discriminatory a challenged tariff provision that eliminated the transportation of common fireworks.[22] The Commission concluded that carrier refusal to transport fireworks was made on the basis of inconvenience rather than compelling necessity, and the involved carriers were ordered to

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[17]Docketed as Ex Parte No. MC-191, *Credit and Freight Bill Collection Practices of Household Goods Motor Common Carriers.*

[18]Ex Parte No. MC-42, *Handling of C.O.D. Shipments*, ____ I.C.C.2d ____ (1987), served December 2, 1987.

[19]I & S No. M-29788, *Charge for Shipments Moving on Order-Notify Bills of Lading, N.M.F.T.A.*, ____ I.C.C.2d ____ (1988), served January 26, 1988.

[20]Investigation and Suspension Docket No. M-30402, *Rate Changes by Collective Procedures, HGCG, August 1987 Investigation* (not printed), served March 7, 1988, corrected decision served March 10, 1988.

[21]Section 5a Application No. 1, *Household Goods Carriers' Bureau, Inc.—Agreement* (not printed), served April 6, 1988.

[22]*B.J. Alan Co., Inc. et al. v. United Parcel Service (an Ohio Corporation), United Parcel Service, Inc. (a New York Corporation), and Roadway Package System, Inc.*, ____ I.C.C.2d ____ (1988), served July 12, 1988.

restore the service. At the close of the fiscal year, this decision was on appeal before the Commission and the courts.

In another decision, the Commission determined that, in situations in which motor, rail, and water carriers involved in through movements between Puerto Rico and inland points of the United States held themselves out to the public as participants in a joint transportation service, and where appropriate tariff schedules reflecting joint rates and through services were on file with the ICC, the water transportation portion of the carriage at issue fell within the jurisdiction of the Commission rather than within that of the Federal Maritime Commission.[23]

During the fiscal year, there was an increase in the number of collective proposals for general rate increases filed by motor carrier rate bureaus. Many bureau member carriers "flagged out" of the proposed general increases and published their own similar increases through independent action. The exercise of this alternative was prevalent in those instances in which the Commission suspended proposed general increases. In a number of cases, including cases pending at the end of last fiscal year, the Commission vacated suspensions when, because of independent action by a significant number of bureau member carriers, the remaining general increases or adjustments would have resulted in an increase of less than $1 millon in annual operating revenues from the transportation of the traffic at issue.[24]

Rate Bureaus

During fiscal year 1988, the Commission continued its processing of collective ratemaking agreements.[25] Significant progress was made, as more decisions were issued by the Commission in this period than in any prior year. As a result, the Commission: (1) provisionally approved, subject to further changes, agreements filed by eight rate bureaus; (2) continued provisional approval, subject to further changes, of agreements filed by eight rate bureaus; (3) revoked the antitrust immunity of two rate bureaus; (4) directed two rate bureaus to show cause why their antitrust immunity for collective ratemaking activities should not be revoked; and (5) granted final approval of agreements filed by 10 rate bureaus.

In one proceeding, the Commission approved the jointly filed application of two rate bureaus to amend their respective rate bureau agreements to incorporate an interterritorial agreement.[26]

In a decision interpreting the Motor Carrier Act's prohibition against collective single-line ratemaking, the Commission directed a rate bureau to restrict its tariff proposals in two consolidated proceedings soley to joint-line application, or to cancel them.[27] The Commission concluded that these proposals did not fall within the statutory "changes in tariff structures" exception to the single-line collective ratemaking prohibition.[28]

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[23]No. MC-C-30017 *Valley Freight Systems, Inc. v. Trailer Marine Transport Corporation* (not printed), served July 25, 1987.

[24]See 49 CFR Part 1139.

[25]Under 49 U.S.C. 10706, as amended by Section 14 of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (July 1, 1980).

[26]Section 5a Application No. 45 (Amendment No. 10), *Niagara Frontier Tariff Bureau, Inc.—Agreement*, and Section 5a Application No. 60 (Amendment No. 7), *Rocky Mountain Carriers—Agreement* (not printed), served July 26, 1988.

[27]No. 40110, *Single Factor Through Class Rates from and to Points in New Mexico*, and No. 40110 (Sub-No. 1), *Single Factor Through Class Rates from and to Points in Oregon* (not printed), served July 15, 1988.

[28]See 49 U.S.C. 10706(b)(3)(D)(iii).

In another proceeding, the Commission ordered the Household Goods Carriers' Bureau to cancel certain tariff items that had been established in violation of the above-noted prohibition.[29] The Commission found that classification and ratemaking functions had not been performed in a reasonably distinct and segregable manner and that the "changes in commodity classifications" exception to the prohibition thus did not apply.[30] In a subsequent decision reviewing the HGCB's revised rate bureau agreement, the Commission further discussed the necessity of separating classification and ratemaking functions and advised the HGCB to clarify the procedures it follows to assure the separation of functions.[31] In another decision, the Commission found that certain tariff provisions proposed by the Middle Atlantic Conference (MAC) violated the prohibition against collective single-line ratemaking.[32] The Commission rejected arguments that the proposals were rules having substantial general application throughout the MAC ratemaking territory and therefore within an exception to the prohibition.[33]

The Commission revived and then discontinued a proceeding involving requests by several motor carrier rate bureaus to expand the territorial scope of their collective ratemaking activities, since there was no continuing interest in the expansion of the individual bureaus.[34] The proceeding had been held in abeyance until the Commission had completed its review of the major bureaus' collective ratemaking agreements.

Operating Rights

The Commission's operating rights policies and licensing practices reflected its continuing commitment both to simplify the licensing process and to do its part to aid highway safety. By eliminating unnecessary barriers to entry, carefully monitoring carrier safety records, and encouraging new and expanded motor carrier operations, the Commission's operating rights activity enhanced the quantity and quality of trucking service in the public interest.

Common carrier authorities issued under the Commission's simplified and expedited licensing procedures continue to provide for the transportation of general commodities, with the usual exceptions,[35] or other broad classifications, nationwide, or in a sizable region of the country. The Commission's service authorizations were predicated on an applicant's fitness, willingness, and ability to provide the proposed service; evidence that applicable statutory and adminstrative requirements will be observed; confirmation that operations will serve a useful public purpose and be responsive to a public demand or need;[36] and a finding that the requested operating authority will not be inconsistent with public convenience and necessity.[37]

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[29] Investigation and Suspension Docket No. M-30402, *Rate Changes by Collective Procedures, HGCB, August 1987 Investigation* (not printed), served March 7, 1988, corrected decision served March 10, 1988.

[30] See 49 U.S.C. 10706(b)(3)(D)(iii).

[31] Section 5a Application No. 1 *Household Goods Carriers' Bureau, Inc.—Agreement* (not printed), served April 6, 1988.

[32] Investigation and Suspension Docket No. M-30397, *Payment of Freight Charges, M.A.C., June 15, 1987* (not printed), served February 1, 1988.

[33] See 49 U.S.C. 10706(b)(3)(D)(iv).

[34] Ex Parte No. 297 (Sub-No. 7), *Motor Carrier Rate Bureaus—Expansion of Collective Ratemaking Territory* (not printed), served April 22, 1988.

[35] Classes A and B explosives, household goods, and commodities in bulk.

[36] See 49 U.S.C. 10922(b)(1).

[37] See the proviso to 49 U.S.C. 10922(b)(1).

The Commission's licensing activity was complemented by a variety of proceedings which clarified or simplified trucking regulation. As discussed below, procedures were streamlined, rules and regulations were updated, and interpretations of operating authority were issued. By issuing such decisions, the Commission eased the burden of regulation and helped trucking companies to devote their energies to serving the public.

The Commission adopted technical revisions to its procedural regulations generally governing motor, rail, water carrier, broker, and freight forwarder proceedings and requiring parties to such proceedings to file an original and 10 copies of all pleadings.[38] One revision implemented a uniform copy requirement as a part of the Commission's Rules of Practice[39] in the interest of administrative simplification, but allowed sufficient flexibility to require reduced or increased numbers of copies where appropriate to particular proceedings, such as applications for temporary and emergency temporary authority.

The Commission also adopted revised licensing procedures that transfer the responsibility for providing copies of licensing application packages from an applicant's representative to a Commission-designated contract agent.[40] This ensured more expeditious and timely processing of licensing applications and simplified and enhanced the application process. Interested persons seeking information about pending licensing matters may thus consult a single information clearinghouse and obtain copies of applications from that source upon written request and payment of a required fee.

The Commission adopted a rule and an accompanying adminstrative ruling simplifying the composite list of exempt and non-exempt agricultural commodities.[41] by eliminating redundant information contained in Administrative Ruling No. 119.[42] The revised list is a composite identification of all agricultural commodities that are specifically not exempt by statute. It thus provides a readily available reference tool that will be of greater value to the public than the extremely lengthy and redundant listings that previously were available.

The Commission further endeavored to simplify and reduce its administrative regulations by proposing revisions to 49 CFR Parts 1004, 1041, and 1042 and requesting comments on the proposed revisions.[43] The rules involved relate to interpretations of practices, operating authorities, and the routes of operation of property carriers.

The Commission issued a series of decisions determining whether shipments of commodities within a single state subsequent to an interstate movement are in interstate commerce. In one case, the Commission denied a petition to reopen an earlier decision finding that movements of grocery items from distribution centers in Texas and California to points in the same

[38] Ex parte No. 471, *Copies of Pleadings*, 4 I.C.C.2d 297 (1988) and 4 I.C.C.2d 581 (1988).

[39] 49 CFR 1104.3(a).

[40] Ex Parte No. 55 (Sub-No. 68), *Revised Procedures for Obtaining Copies of Motor Carrier, Water Carrier, Property Broker, and Household Goods Freight Forwarder Applications* (not printed), served April 28, 1988, and (as corrected) May 9, 1988, which amended 49 CFR 1160.13.

[41] 49 U.S.C. 10526(a)(6).

[42] Ex Parte No. MC-189, *Agricultural Commodities Exemption*, 4 I.C.C.2d 402 (1988).

[43] Ex Parte No. 55 (Sub-No. 67), *Non-Rail Interpretations and Routing Regulations* (not printed), served August 4, 1988.

states, after prior movements from out-of-state points, were in interstate commerce.[44] In other proceedings involving similar questions of determining the interstate or intrastate nature of transportation services performed within a single state, the Commission found to be in interstate commerce the transportation of fertilizer within Texas following a rail or exempt water movement from out-of-state origins[45], and the transportation of paper products within California following prior movements from out-of-state origins and temporary storage at a distribution center.[46]

As the fiscal year closed, the Commission was considering public comments that have been submitted in response to its earlier proposal to expand the territorial scope of commercial zones and terminal areas[47] and evidence regarding the formulation of an appropriate class description for shippers served by contract carriers of household goods[48] (See the "Household Goods" section of this chapter.) The process of streamlining, updating, and simplifying operating rights-related, Code of Federal Regulations rules continues.

Insurance

The Commission requires all ICC-regulated transportation entities to file with the Commission and to maintain on a continuous basis evidence of financial responsibility at required minimum Federal limits.[49] Motor carriers and freight forwarders may meet these requirements by filing certificates of insurance, surety bonds, proof of qualification to self-insure, or other securities or agreements in the amounts prescribed.

The minimum amounts of liability coverage for providing protection to the public for bodily injury and property damage (BI&PD) for passenger operations are $1.5 million for carriers whose motor vehicles have a seating capacity of 15 passengers or fewer, and $5 million for those carriers whose vehicles have a seating capacity of 16 passengers or more. The required minimum amounts of BI&PD liability coverage for motor carriers of property and freight forwarders engaged in the transportation of commodities of a non-hazardous nature are $300,000 for those firms whose fleets consist only of vehicles having gross vehicle weight ratings of under 10,000 pounds, and $750,000 for those entities whose vehicles are 10,000 pounds or more in weight.

Regulated firms transporting hazardous substances and materials are required to have liability coverage for BI&PD in the amounts of $1 million or $5 million, depending upon the hazardous nature of the commodities transported. Motor common carriers of property and freight forwarders are also subject to cargo insurance requirements in the amount of $5,000 for losses sustained on any one vehicle, and an aggregate of $10,000 for losses occurring at any one time or place.

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[44] No. MC-C-30006, *The Quaker Oats Company—Transportation within Texas and California—Petition for Declaratory Order* (not printed), served March 9, 1988.

[45] No. MC-C-30002, *Victoria Terminal Enterprise, Inc.—Transportaton of Fertilizer within Texas—Petition for Declaratory Order* (not printed), served December 15, 1987, and April 29, 1988.

[46] No. MC-C-30044, *James River Corporation of Virginia—Transportation through Woodlawn, CA—Petition for Declaratory Order* (not printed), served July 15, 1988.

[47] Ex Parte No. MC-37 (Sub-No. 40), *Commercial Zones and Terminal Areas* (not printed), served April 26, 1987.

[48] No. MC-1745 (Sub-No. 17), *Interstate Van Lines, Inc., Extension—Household Goods* (not printed), served April 8, 1987.

[49] 49 U.S.C. 10927.

Property brokers subject to the Commission's regulations may meet the financial responsibility requirements of 49 U.S.C. 10927 by filing either surety bonds or trust fund agreements in the amount of $10,000.

During fiscal year 1988, the Commission received a total of 81,904 insurance filings, which represented an increase of nearly 7 percent over the number received during fiscal year 1987. These filings included notices of cancellation, as well as new and replacement certificates of insurance, surety bonds, and trust fund agreements. Although motor carriers, freight forwarders, and property brokers continued to encounter problems in purchasing or maintaining evidence of security, the availability problem was not as severe during fiscal year 1988 as it was during fiscal years 1985 through 1987. However, the high premiums associated with obtaining security continued to cause problems for all segments of the motor carrier industry, especially for those carriers transporting Classes A and B explosives and other highly hazardous materials, since these entities are required to have aggregate coverage for bodily injury and property damage in the amount of $5 million.

Since the implementation of the Motor Carrier Act of 1980, which resulted in the relaxation of entry and licensing procedures, the property broker segment of the transportation industry has grown significantly. By the end of fiscal year 1988, nearly 6,100 property brokers had been issued licenses to arrange interstate transportation. Although a total of 2,160 new or replacement surety bonds were filed on behalf of property brokers during the year, many brokers, because of an inability to find an insurance or surety company to write these fixed-penalty bonds on their behalf, were eliminated from competing in the marketplace. In an effort to remedy this situation, the Commision adopted final rules[50] which permit property brokers to satisfy their security requirements by establishing trust funds with financial institutions, and by filing evidence of security with the Commission in the form of a trust fund agreement. During the year, the Commission accepted 120 property broker trust fund agreements.

The Commission continued to review applications filed by motor carriers for authority to self-insure their bodily injury and property damage and, where appropriate, cargo insurance. During fiscal year 1988, the Commission granted 11 self-insurance application requests. Self-insured carriers are required to file periodic reports, and the Commission maintains a comprehensive monitoring program to ensure that the public remains protected under these initiatives.

Overall, the Commission continued its efforts to monitor and alleviate problems associated with insurance availability and affordability during the year by providing transportation firms subject to regulation with alternative methods of complying with the requirements of 49 U.S.C. 10927. The Commission believes that these alternatives have influenced the availability of security and, as such, have reduced the severity of the insurance crisis facing the transportation industry.

Safety

Motor carrier safety continues to be a primary concern when the

[50] Ex Parte No. MC-5 (Sub-No. 8), *Property Broker Security for the Protection of the Public*, 4 I.C.C.2d 358 (1988), codified in 49 CFR 1043.4

Commission evaluates the fitness of applicants for new or expanded authority. Consistent with the intent of the Motor Carrier Safety Act of 1984,[51] the Commission continued its efforts to identify motor carriers with questionable safety records and to scrutinize more aggressively the safety profiles of applicants seeking authority.

Based on ratings prepared by the U.S. Department of Transportation (DOT), approximately 260 licensing cases involving questionable safety fitness were processed by the Commission during fiscal year 1988. Typically in instances in which applicants for authority held "conditional" safety ratings—an indication of the DOT's willingness to accord such carriers the opportunity to improve their safety compliance records—the Commission granted the authority sought, subject to a one-year term limitation. During the past fiscal year, the Commission granted 78 one-year, limited-term certificates and permits to carriers holding conditional safety ratings. Such limited-term authority was issued with the understanding that the involved operating rights would expire at the conclusion of the term, unless an applicant established in a petition for removal of the condition that it was in full compliance with the terms and conditions of its authority, including pertinent statutory provisions and DOT and Commission regulations. The Commission denied the applications of five conditionally rated carriers. It granted unrestricted authority to seven applicants upon a showing that their ratings had improved from "conditional" to "satisfactory."

Last year, the Commission conditioned the issuance of any operating authority for 16 applicants with "unsatisfactory" safety ratings on the applicants' showing of either an improved safety rating or compelling reasons why authority should be issued. The Commission denied the applicatins of 11 applicants holding unsatisfactory ratings and granted limited-term or unrestricted authorities to 16 applicants which showed that their ratings had been upgraded from unsatisfactory.

In the cases of 124 carriers holding less than satisfactory ratings, the Commission held open applications for further evidence on the issue of safety fitness. In these proceedings, the applicants had sought authority that would have enabled them to transport passengers or hazardous materials or flammable liquids. In such proceedings, the Commission determined that closer scrutiny of the applicants' safety fitness was required.

During fiscal year 1988, the Commission granted 81, and denied seven, petitions to remove term limitations from operating authorities. Petitions were granted based on showings of improved safety ratings. The Commission also granted extensions of limited-term authorities in 25 proceedings involving carriers which continued to hold conditional safety ratings when circumstances warranted additional time to permit the carriers to receive new DOT ratings.

In view of several carriers' histories of unsafe motor carrier operations, the Commission instituted investigations with a view toward the issuance of decisions compelling compliance with pertinent statutory and regulatory requirements of the Commission and the DOT.[52] In an in-

[51] P.L. No. 98-554 (October 11, 1984).

[52] See, e.g., No. MC-C-30097, *Ram Rod Trucking & Storage, Inc., Investigation and Revocation of Certificates and Permits* (not printed), served June 7, 1988.

vestigation proceeding concluded during the fiscal year, the Commission found that a carrier had overcome its safety problems and had been given a satisfactory safety rating by the DOT.[53]

The Commission amended its regulations.[54] to make safety fitness a substantive issue for consideration in determining whether to approve transfers under 49 U.S.C. 10926 and to grant exemptions under 49 U.S.C. 11343(e) for the purchase or merger of motor carrier authority.[55] The Commission noted that safety-related concerns naturally would focus on a transferee's safety rating but that, in certain circumstances, a transferor's rating would be relevant. The Commission applied the new transfer rules during the year by granting conditional, one-year approval of certain transfers involving transferees that were wholly owned subsidiaries of conditionally rated transferors.[56] In another proceeding, the Commission denied the proposed transfer of passenger carrier authority from a carrier holding an unsatisfactory safety rating to an affiliated entity.[57]

Foreign Carriers

A statutory licensing moratorium prohibiting the Commission from issuing authority to carriers domiciled in Mexico, or owned or controlled by Mexicans, remained in effect during the past fiscal year, as did President Reagan's order lifting the moratorium with respect to Canadian motor carriers.[58] As a result, the Commission continued to observe procedures promulgated for the enforcement of the moratorium on Mexican domiciled, owned, or controlled applicants for operating authority.[59]

The Commission also continued to issue foreign-carrier certificates of registration to Mexican domiciled or controlled carriers seeking to transport exempt commodities or to provide private carriage services in the United States. This action implements a provision of the Motor Carrier Safety Act requiring Mexican private carriers and exempt commodity transporters annually to obtain certificates of registration to operate in this country.[60]

Household Goods

Before the beginning of fiscal year 1988, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded to the Commission a decision in which the Commission had granted contract carrier authority for the transportation of household goods for the class of shippers identified as "persons (except individuals) as defined in 1 U.S.C. 1."[61] The Court held that the permit granted had not specified the class to be served with sufficient precision necessary to ensure that applicants would serve only

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[53]No. MC-C-30057, *Long Island Airports Limousine Corp.—Investigation and Revocation of Certificates* (not printed), served March 22, 1988.

[54]49 CFR 1181 and 1186.

[55]*Transfer Rules*, 4 I.C.C.2d 382 (1988).

[56]No. MC-FC-63285, *Chevalley Moving & Storage of Dewey, Inc., Transferee, and Millstead Van Lines, Inc., Transferor* (not printed), served July 25, 1988; and No. MC-F-19065, *Truck Transportation, Inc., Transferee, and Geo. F. Alger Company, Transferor* (not printed), served May 31, 1988.

[57]No. MC-FC-63231, *Babel Travel Service, Inc., Transferee, and Babel Bus Service, Inc., Transferor* (not printed), served July 22, 1988.

[58]See 49 U.S.C. 10922(l). During September 1988, the President extended the moratorium with respect to Mexican carriers.

[59]Ex Parte No. 55 (Sub-No. 43D), *Certification of Canadian or Mexican Ownership or Control of Applicants for Motor Common or Contract Authority*, 47 Fed. Reg. 42948 (September 29, 1982).

[60]49 U.S.C. 10530. See *Certificates of Registration of Certain Foreign Carriers*, 133 M.C.C. 511 (1985).

[61]*Global Van Lines, v. ICC*, 804 F.2d 1293 (D.C. Cir. 1986).

shippers with distinct needs, and thereby did not ensure that applicants would function only as motor contract carriers.[62] In accordance with that court order, the Commission entered a decision reopening the case under review together with 207 related cases collectively referred to as the *Interstate* cases.[63]

In reopening these proceedings, the Commission permitted parties to submit additional evidence addressing pertinent issues, including whether the applicant in a case in question wished the Commission to: (1) consider issuing a permit authorizing service to a more narrowly defined class of shippers with distinct service needs; (2) issue an amended permit that authorized its holder to dedicate equipment to the exclusive use of each shipper in the pertinent class in accordance with the applicable alternative statutory prerequisite for a permit;[64] or (3) issue a permit authorizing a carrier to serve the broad class of shipper previously authorized, based on a specific showing that the carrier would be offering a new service better tailored to fit specified shipper requirements.

The evidentiary records in the 208 reopened proceedings have been completed. Fifty-three of the applicants either expressed no interest in pursuing any of the options accorded them or requested that their grants of household goods contract carrier authority be withdrawn. The Commission issued appropriate decisions modifying and canceling permits, as required.[65] As the fiscal year concluded, the Commission was reviewing the records in the remaining reopened proceedings.

Also during the year, a number of carriers applied for contract carrier authority to transport household goods for broad classes of shippers, such as commercial shippers or national account shippers. Because these applicants raised issues that were raised in the *Interstate* cases, the applications were held open and the applicants generally were accorded the opportunity to submit evidence and argument addressing the same issues addressed by the applicants in the 208 *Interstate* cases.[66]

Near the end of fiscal year 1987, the Commission had instituted a declaratory order proceeding to review the broad question of the lawfulness of household goods discount tariffs that contain a range of discounts, and to consider the effect of binding-estimate authority on the lawfulness of such tariffs.[67] Statutory provisions require that the rates for transportation services must be contained in tariffs that are in effect, and that carriers may not charge or receive compensation different from rates specified in tariffs.[68] The matter is currently pending before the Commission.

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[62]49 U.S.C. 10102(Bx15xiii).

[63]No. MC-1745 (Sub-No. 17), *Interstate Van Lines, Inc., Extension—Household Goods, et al.* (not printed), served April 8, 1987.

[64]49 U.S.C. 10102(Bx15xiii).

[65]No. MC-65038 (Sub-No. 2), *William J. Blair, d/b/a Blair Transfer & Storage Co. Extension—Contract Service* (not printed), served December 7, 1987; and No. MC-1931 (Sub-No. 22), *Von Der Ahe Van Lines, Inc., Extension—Household Goods* (not printed), served December 3, 1987.

[66]See, e.g., No. MC-2729 (Sub-No. 10), *Glenwood Transit Line, Inc., Extension—49 State Contract Carrier Service* (not printed), served September 14, 1988; No. MC-198881 (Sub-No. 1), *Olson Warehouse Company, Inc., Contract Carrier Application* (not printed) served May 5, 1988; and No. MC-169343 (Sub-No. 3), *Fry-Wagner Moving & Storge Co. Contract Carrier Application* (not printed), served March 18, 1988.

[67]No. MC-C-30029, *Andrews Van Lines, Inc. et al.—Petition for Declaratory Order* (not printed), served July 20, 1987.

[68]49 U.S.C. 10761 and 10762.

The Commission also sought comments on a proposal by the Movers' and Warehousemen's Association of America, Inc., to amend the Commission's regulations to increase the minimum declared lump-sum value on household goods.[69] The Commission noted that the purpose of the determination of the minimum valuation is to protect small shippers and small carriers by assuring that shippers do not unknowingly underestimate the value of their shipments, and to avoid forced overvaluation. Prior to the Commission's reaching a decision, the petitioners withdrew their proposal, and the Commission dismissed the case.[70]

The number of complaints received concerning household goods carriers during the fiscal year was at the lowest level of any fiscal year since passage of the Household Goods Transportation Act of 1980.[71] Data for the fiscal year represent a 4-percent decline in the number of complaints against those received in fiscal year 1987, the previous record-low year.

The Independent Trucker

Because the Commission responded to major widespread owner-operator concerns in earlier years, during fiscal year 1988 there was no need to implement new rules or change policies affecting the operations of independent truckers. The leasing rules developed in previous years provided equitable protection for owner-operators and the carriers they serve.

As in past years, the Commission's Office of Public Assistance counseled hundreds of owner-operators in obtaining operating authority and in expanding operations. While approximately 100 owner-operators filed for and were granted authority under the special entry and tariff procedures available only to independent truckers, in fiscal year 1988 the vast majority were more apt to seek authority broader than that used under the fitness-only owner-operator foodstuffs category. This trend confirms that owner-operators are taking full advantage of eased-entry regulations and are actively broadening the scope of their operations.

The Commission investigated over 900 complaints lodged by independent truckers during the year. These complaints were primarily related to delayed payments and settlement agreements. Action by the Commission's Office of Compliance and Consumer Assistance resulted in the recovery of $432,835 for involved owner-operators and, in many instances, required changes in carriers' lease contracts to conform to Commission rules.

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[69] Ex Parte No. MC-61, *Released Rates of Motor Common Carriers of Household Goods* (not printed), served February 17, 1988.

[70] *Ibid.*, decision served May 10, 1988.

[71] P.L. No. 96-454 (October 15, 1980).

BUS COMPANIES

General Financial Condition

A major change in the intercity bus industry's operations occurred throughout fiscal year 1988 as the GLI Acquisition Company (Greyhound) continued to assume operations over the routes of Trailways Lines, Inc. Greyhound, a wholly owned subsidiary of Greyhound Lines, Inc., had filed an application with the Commission on June 19, 1987, requesting permission to purchase the operating rights and some operating assets of Trailways and, pending a final decision, to operate over Trailways' routes by means of temporary authority. The Commission granted temporary authority in July 1987[1] and granted final approval to a merger between Greyhound and Trailways in June 1988.[2]

Recent Commission data for the bus industry are dominated and negatively affected by the restructuring and reorganization of the dominant carriers, Greyhound and the former Trailways system. Commission data for the nation's 10 largest bus companies for the 12 months ending June 30, 1988, and June 30, 1987, show that operating revenues rose 2.4 percent, to $963.6 million. Net carrier operating income for these carriers rose from a $0.6 million loss to a $24.8 million profit as earnings from carrier operations during the twelve months ending June 30, 1987, were severely depressed because of the large loss incurred by Trailways, which had ceased operating over its routes in July 1987 upon Greyhound's assumption of temporary authority. Net income for the 10 largest carriers decreased from a $13.9 million profit to a $25.1 million loss, primarily because of interest expense incurred by Greyhound in connection with its Trailways acquisition. However, the nine regional carriers included in this 10-carrier group reported an increase in net income from $4.6 million to $9.4 million.

Revenues passengers carried for the nine regional carriers rose 6.2 percent. Revenue-passenger data for Greyhound for the twelve months ended June 30, 1988, and June 30, 1987, are not comparable since, beginning in 1988, Greyhound changed its method of recording the number of passengers carried in recognition that passenger counts made prior to 1988 may have been overstated.

As of the end of the fiscal year 1988, it was too early to assess the results of the recently approved Greyhound-Trailways merger. Yet, in approving temporary operational authority, the Commission found that a further decline in Trailways' financial condition could have forced that carrier to curtail or eliminate its operations. In approving the merger, the Commission also found that Trailways was a "failing firm" that would have entered into Chapter 7 bankruptcy (liquidation) proceedings, if not for the Greyhound buyout.

Rates and Operating Rights

During fiscal year 1988, the Commission decided 696 motor carrier applications for authority to transport passengers, and it denied only four of these on the merits of the applications. A total of 584 carriers requested initial certificates to

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[1]No. MC-F-18505-TA, *GLI Acquisition Company—Purchase—Trailways Lines, Inc.; GLI Acquisition Company—Control—Continental Panhandle Lines, Inc.* (not printed), served July 2, 1987, as modified by decision served July 8, 1987.

[2]Docket No. MC-F-18505, *GLI Acquisition Company—Purchase—Trailways Lines, Inc.; GLI Acquisition Company—Control—Continental Panhandle Lines,Inc.*, ____ I.C.C.2d ____ (1988), served June 7,1988.

operate as common carriers, 35 sought initial permits to operate as contract carriers, 74 carriers sought extensions for common carriage, and three carriers sought extensions of their contract carrier authority. Also during the fiscal year, 682 carriers filed applications for initial or extended authority to transport passengers.

Most of the common carrier applicants sought authority to conduct charter and special operations, and the remainder sought authority to provide scheduled operations over specified routes. Under the state pre-exemption provisions,[3] many applicants for regular-route authority requested intrastate authority on the routes over which interstate authority also was requested.

Prior to the beginning of the fiscal year, Congress had enacted legislation that had changed the entry policy for motor common carriers of passengers receiving governmental financial assistance, and two new categories of applicants were established: the "private" recipient and the "public" recipient of governmental financial assistance.[4] In view of the new legislation, the Commission proposed and adopted final rules[5] which implemented provisions of legislation that had adopted additional public-interest factors to be considered under the current public-interest test in evaluating applications by assistance recipients. These additional public-interest factors require that the Commission consider the amount and extent of government financial assistance received by an applicant for a certificate and, in applications by public recipients, whether those opposing an application are motor common carriers willing and able to provide the transportation proposed. The amended rules provide procedures for public and private recipients to apply for common carrier authority.

The Commission decided a case that had been remanded to it by the U.S. Court of Appeals for the Ninth Circuit.[6] The court had held that the Commission has authority to issue a certificate under 49 U.S.C. 10922(c)(2)(B) granting authority to conduct intrastate regular-route operations only in situations in which the intrastate operations are conducted as part of existing interstate operations.[7] The Court's decision was issued shortly before a legislative amendment was enacted that similarly limited the Commission's jurisdiction to authorize intrastate operations.[8] Under the current law, it is not enough for a carrier merely to offer interstate transportation on a route over which it conducts intrastate service. Instead, the interstate service must be active, regularly scheduled, *bona fide*, involve operations in more than one state, and be "substantial." Significantly, while interstate and intrastate services need not be identical nor provided in the same vehicle, intrastate service may not be provided independently of interstate service.

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[3]49 U.S.C. 10922(c)(2)(B).

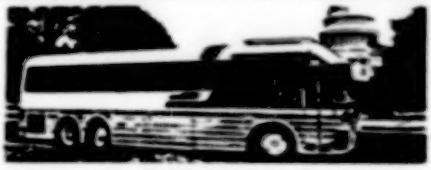
[4]Section 339, Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (April 2, 1987).

[5]*Passenger Comm. Car. Appl. Recipients Gov. Assist.*, 4 I.C.C.2d 372 (1988) and *Appl. to Transp. Recipients of Governmental Assist.*, 4 I.C.C.2d 114(1987).

[6]No. MC-C-10917, *FunBus Systems, Inc.—Intrastate Operations—Petition for Declaratory Order*; No. MC-C-153325 (Sub-No. 2), *Lounge Car Tours Charter Company, Inc., Extension—Nine Regular Routes*; and No. MC-C-10943, *Airport Service, Inc. v. Lounge Car Tours Charter Company, Inc., and Lounge Car Tours, Inc.* (not printed), served January 6, 1988.

[7]*FunBus Systems, Inc. v. C.P.U.C.*, 801 F.2d 1120 (9th Cir. 1986).

[8]Section 340, Surface Transportation and Uniform Relocation Assistance Act of 1987, *supra*.



In this case, the Commission found that the intrastate operations of the carrier at issue had not been conducted in a lawful manner.[9] The basis for this decision was the finding that the carrier had not transported a "substantial" amount of interstate traffic relative to the intrastate traffic it had transported in the involved service. Accordingly, a cease-and-desist order was entered against the carrier's performance of the intrastate operations involved.

The Commission also reopened for additional evidence several other proceedings in which carriers had been granted intrastate regular-route authority under the pre-emption provisions of 49 U.S.C. 10922(c)(2)(B).[10] Based on findings that insubstantial interstate service was being provided over the involved routes, the Commission declared unlawful the related intrastate operations of two specific carriers.[11] In another proceeding, the Commission granted a carrier intrastate regular-route authority, subject to a specific condition pertaining to the new statutory limitation.[12]

The Commission granted Greyhound's application to purchase the interstate and intrastate operating rights and principal operating assets of Trailways Lines and to acquire Trailways' 50-p ercent stock interest in Continental Panhandle Lines, Inc. The Commission held an open voting conference and found that Trailways was unable to resume meaningful operations on its own and that the application provided the only available means for assuring continued operations of the Trailways route network.[13]

The Commission also found that the competitive posture of the bus industry would be enhanced b the operation of a unified, nationa bus system under Greyhound's management, to the benefit of the traveling public. The Commission declined to impose any conditions on the transactions either to protect other bus lines (including some independent affiliates of the National Trailways Bus System not involved in the transaction), or to protect the interests of former Trailways employees, many of whom had already been employed by Greyhound during operation of the Trailways System under temporary authority. The Commission additionally found that the conditions proposed by the various opposing carriers—conditions which had been designed to maintain the status quo—not only were unnecessary but also would threaten Greyhound's ability to compete, to the disadvantage of the traveling public.

The Commission issued a declaratory order determining that incidential charter rights (accruing to certain passenger certificates under 49 U.S.C. 10932(c)) do not authorize operations entirely within the territory under the jurisdiction of the Washington Metropolitan Area

[9]No. MC-C-10917, *FunBus Systems, Inc., et al.*, supra, served August 17, 1988.

[10]See, e.g., No. MC-C-10980, *O'Hare Wisconsin Limousine Service, Inc.—Intrastate Operations—Petition for Declaratory Order* (not printed), served March 24, 1988; and No. MC-C-10956, *Erin Tours, Inc.—Intrastate Operations—Petition for Declaratory Order* (not printed), served March 23, 1988.

[11]No. MC-C-10980, *O'Hare*, supra, served August 17, 1988; and No. MC-C-10956, *Erin*, supra, served August 2, 1988.

[12]No. MC-145482 (Sub-No. 6), *Inner Circle Operations, Inc., Extension—Hoboken and Fairview, NJ* (not printed), served May 24, 1988.

[13]No. MC-F-19505, supra.

Transit Commission (WMATC).[14] This determination considered the jurisdictional balance between two regulatory agencies under the Washington Metropolitan Area Transportation Regulation Compact[15] and recognized the Compact's purpose to assign regulation over local passenger transportation services to WMATC, excepting only those regular-route operations that extend beyond the territorial boundaries of WMATC's jurisdiction.

In fiscal year 1988, two carriers filed petitions under the Commission's procedures for pre-empting state rate jurisdiction and authorizing intrastate rate increases in situations in which a state has denied, or failed to consider, a carrier's request for such increases.[16] In one proceeding, the Commission granted a petition for review of a decision of the Connecticut Department of Transportation that had partially denied a carrier's proposed fare increases, and rejected arguments that the carrier had failed to invoke the governing statutory presumption by presenting evidence of "comparable" interstate and intrastate operations.[17] The Commission found that the statute did not require comparison of rates for service between the same two points, and that the involved interstate and intrastate routes were of a similar length, and all within the same small geographic region, and thus comparable. In the second proceeding, an involved state agency was found neither to have issued a timely decision on a carrier's original application, nor to have filed an answer to a petition for review. As required by statute, the Commission then granted the carrier permission to increase its intrastate fares as proposed.[18]

Service

In fiscal year 1988, 324 complaints were received by the Commission from passengers utilizing intercity passenger service. These figures represented a 9-percent increase over the number of similar complaints received during fiscal year 1987. The majority of the complaints involved failure to provide scheduled service; delays in providing service in accordance with published operating schedules; service provided by unauthorized carriers; and occasional in-transit service failures, such as equipment breakdowns. In addition, there were 51 complaints involving passenger carriers' handling of parcels, luggage, and small shipments.

Fifty-one complaints were received involving overcharges in connection with rates or charges published in tariffs governing carrier assessments for services provided. Seventy-eight complaints involved dissatisfaction with the carriers' handling and processing of claims.

The Commission continued its program of passenger carrier inspections at tourist attractions and recreational centers during the year to determine carrier compliance with the ICC's insurance and licensing regulations. This program resulted in the inspection of 2,194 passenger vehicles. Most instances

[14] No. MC-C-30038, *American Coach Lines, Inc., Petition for Declaratory Order* (not printed), served September 14, 1988.

[15] Pub. L. No. 86-794, 74 Stat. 1031 (1960), as amended by Pub. L. No. 87-767, 76 Stat. 764 (1962).

[16] See 49 U.S.C. 11501(e).

[17] No. MC-C-30119, *The Arrow Line, Inc., Petition for Review—Connecticut Intrastate Rates* (not printed), served September 15, 1988.

[18] No. MC-C-30104, *Petition of Peter Pan Bus Lines, Inc., for Review of a Decision of the Massachusetts Department of Public Utilities Pursuant to 49 U.S.C. 11501(e)* (not printed), served August 23, 1988.

of non-compliance discovered were corrected by voluntary discontinuance of service by carriers until operating authority was secured and evidence of insurance filed with the Commission. In some instances, the non-compliance discovered required enforcement actions. In this regard, 24 consent agreements were obtained against bus companies, as well as four civil injunctions and one civil contempt action.

FREIGHT FORWARDERS, WATER CARRIERS, AND PROPERTY BROKERS

Freight Forwarders

In view of the Commission's limited residual regulatory authority over non-household goods freight forwarders, no significant proceedings were instituted or decided in this area during the past fiscal year. The Commission did, however, continue to license household goods freight forwarders.

Water Carriers

The Commission amended its rules to exempt several types of water service and to restore a small-craft exemption that previously had been removed from its rules.[1] The Commission has discretionary authority to regulate certain small-craft operations.[2] Regulations at 49 CFR 1072, governing such operations, had reflected the perception that carriers operating both large and small craft could use unregulated small-craft operations unjustly to discriminate in favor of preferred shippers. The Commission found that, given the current inherent competitiveness of the trade, and the limited use of small craft, regulation is no longer necessary to prevent discrimination.[3] Accordingly, it deleted the rules that had removed the statutory exemption.

The Interstate Commerce Act allows the Commission to exempt the transportation of passengers between places in the United States, through a foreign port, when Commission jurisdiction is not necessary to carry out the national transportation policy.[4] The Commission found that the exemption of this type of service would allow water carriers greater flexibility in price and service options to customers and, thus, would be consistent with the transportation policy.[5] The Commission thus added a regulation at 49 CFR 1071.3 to exempt such transportation.

The statute also directs the Commission to exempt the transportation of property on a vessel furnished by a water contract carrier to a noncarrier when the noncarrier is transporting its own property and the Commission finds its jurisdiction unnecessary to carry out the national transportation policy.[6] The Commission concluded that the regulation of vessel leasing presents an unwarranted barrier to the leasing of vessels and contributes to the inefficient use of water carrier equipment, and thus found that such regulation was unnecessary and contrary to the transportation policy.[7] Accordingly, the Commission amended its regulations at 49 CFR 1071.1 to exempt all contract carrier vessel leasing.

The Interstate Commerce Act further directs the Commission to exempt the transportation of property by a water carrier if it finds that a carrier is transporting only the property of a person owning substantially all of the voting stock of the carrier.[8] The Commission determined that ownership of 80 percent of the voting stock of a water carrier meets the test of substantiality, and it added a rule at 49 CFR 1071.4 exempting the transportation of owned property.[9]

Additionally, the Act requires the Commission to exempt from its jurisdiction water contract carrier transportation of certain classes of commodities when it finds that the transportation at issue is not actually

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[1] Ex Parte No. 467, *Exemption of Water Carrier Operations*, 4 I.C.C.2d 656 (1988).
[2] 49 U.S.C. 10544(a)(2).
[3] Ex Parte No. 467, *supra*.
[4] 49 U.S.C. 10544(b).
[5] Ex Parte No. 467, *supra*.
[6] 49 U.S.C. 10544(e).
[7] Ex Parte No. 467, *supra*.
[8] 49 U.S.C. 10544(f)(1).
[9] Ex Parte No. 467, *supra*.

and substantially competitive with rail or motor transportation of commodities involved.[10] Although it solicited comments in this area, the Commission received no requests for exemptions other than those in its existing regulation at 49 CFR 1071.2, and therefore made no modification to the rule.

Under the law, the Commission has no jurisdiction over ferry transportation unless it makes a specific finding that regulatory scrutiny is required to effect the national transportation policy.[11] In a significant decision, the Commission dismissed a water common carrier application on the grounds that the proposed service was an exempt ferry service.[12] In reaching its decision, the Commission considered historical interpretive principles and regulations developed by the U.S. Department of Transportation and the Federal Maritime Commission and determined that the applicant's proposed routes were substitutes for bridges and thus within the scope of the ferry exemption. The Commission found that the public record, including evidence presented by an opposing carrier, did not warrant a conclusion that regulatory scrutiny was required to effectuate the national transportation policy.

In a related proceeding, the Commission dismissed an application because the public record was insufficient to enable the Commission to determine whether a proposed service was exempt from Commission jurisdiction, or to make required statutory findings for authorizing a grant of authority.[13]

In another decision, the Commission directed a water carrier freight bureau to show cause why its antitrust immunity for future actions should not be revoked for non-use of, and lack of intent to use, its rate bureau agreement.[14]

Property Brokers

Property brokerage continued to be a significant transportation growth area throughout fiscal year 1988. As a result of relaxed entry standards and licensing procedures brought about by the Motor Carrier Act, there are now more than 9,000 authorized brokers, of which more than 6,000 are active. The industry remains highly decentralized and competitive.

The Commission adopted new rules that authorize property brokers to establish trust funds as an alternative security to surety bonds.[15] The Commission had found that surety bonds and trust fund agreements would protect motor carriers and the shipping public against dishonest and financially unstable brokers, with minimal government interference in the business dealings between brokers on the one hand, and shippers and carriers on the other. In implementing the new rules, the Commission concluded that the continuation of a $10,000 bond amount or the initiation of a $10,000 trust amount would not endanger the public interest in any way. The Commission determined that the trustee to any trust fund should be a "financial institution," and the Commission fashioned a broad definition of that term.

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[10] 49 U.S.C. 10544(c).

[11] 49 U.S.C. 10544(a)(4).

[12] *Viking Starship, Inc. Common Carrier Application*, 4 I.C.C.2d 634 (1988).

[13] No. W-1470, *Liberty Belle Ltd. Common Carrier Application* (not printed), served September 14, 1988.

[14] Section 5a Application No. 10, *Waterways Freight Bureau—Agreement* (not printed), served July 13, 1988.

[15] Ex Parte No. MC-5 (Sub-No. 8), *Property Broker Security for Protection of Public*, 4 I.C.C.2d 358 (1988); 3 I.C.C.2d 916 (1987).

The Commission also devised a prescribed trust fund agreement that essentially embodied the conditions outlined in its decision. The final rules permitting a broker to file evidence of financial responsibility in the form of a surety bond or trust fund in the amount of $10,000 appear at 49 CFR 1043.4.

In a related proceeding, the Commission denied a request by an offshore captive insurance company to be recognized as a financial institution for purposes of providing broker security.[16] The Commission also declined to amend regulations providing that only financial institutions licensed or qualified to do business in a state or the District of Columbia are eligible to enter into trust fund agreements that are acceptable to the Commission as the required broker security. The Commission found that its licensing requirement for financial institutions does not unreasonably burden such institutions and, at the same time, provides adequate supervision to protect the public from insolvencies.

[16] Ex Parte No. MC-5 (Sub-No. 8), *Property Broker Security for Protection of Public, Petition by Trans Trust Insurance Co., Ltd., for Recognition as a Financial Institution for Purpose of Providing Broker Security*, ____ I.C.C.2d ____ (1988), served September 20, 1988.

INTERMODAL TRANSPORATION

The Commission continued to promote the growth of intermodalism through expedited decisionmaking during fiscal year 1988. According to a statutory exemption for consolidations, mergers, and acquisitions of control,[1] nine intermodal petitions for exemption of control proposals were processed. None of the intermodal exemptions were opposed, although one was dismissed as moot following the sale of a line[2] and one was dismissed as unnecessary.[3]

The Canadian Pacific Limited (CPL) and Incan Ships Limited sought a Commission determination of whether CPL's proposed acquisition of controlling stock interest in Incan Ships would violate the Panama Canal Act,[4] which prevents a railroad from owning or operating a water carrier with which it competes. CPL owns Canadian Pacific Railroad and the Soo Line Railroad Company, while Incan Ships provides water transporation between Thunder Bay, Ontario, Canada, and Superior, Wisconsin. The Commission found that CPL's rail operations and Incan's services do not compete within the meaning of the Panama Canal Act, that the transfer of ownership would not enhance the market power of the rail carriers, and that the transaction would provide public benefits and possibly new and better coordinated services. The transaction was allowed to proceed.[5]

The Commission exempted the acquisition of control by the CSX Corporation (CSX) of two motor carrier subsidiaries—Sea-Land Freight Service, Inc., and Intermodal Services, Inc.—of CSX's own subsidiary, the Sea-Land Corporation. The Commission had previously held that CSX could acquire Sea-Land without violating the Panama Canal Act, but had held the acquisition of the two motor carrier subsidiaries in abeyance until the Commission resolved an issue in a related case that was critical to this one.[6]

As background, Section 11344(c) of the Interstate Commerce Act restricts the acquistion of motor carriers by railroads. In 1984, the Commission adopted new rules to liberalize the Commission's previous interpretation of that section.[7] The U.S. Court of Appeals for the District of Columbia Circuit held that those rules exceeded the Commission's authority and effectively invalidated them by reversing and remanding the first Commission decision that applied them.[8] Congress then enacted a statute which, in effect, overturned the court's decision to the extent it would have precluded transactions agreed to or filed with the Commission by a specified date. The Commission thus applied this new law and authorized CSX to acquire the Sea-Land motor carriers.[9]

In its 1984 decision approving CSX's acquisition of control of

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[1] 49 U.S.C. 11343(e).

[2] Finance Docket No. 31131, et al., *Burlington Industries, Inc.—Continuance in Control Exemption-BFI Railroad Company* (not printed), served January 28, 1988.

[3] Finance Docket No. 31142, *KKR Associates and Safeway Stores, Inc.—Continuance in Control Exemption—Safeway Trucking* (not printed), served May 26, 1988.

[4] 49 U.S.C. 11321.

[5] Finance Docket No. 31112, *Canadian Pacific Ltd. & Incan Ships Ltd.—Joint Application under 49 U.S.C. 11321* (not printed), served December 16, 1987.

[6] *Joint App. CSX/Sea-Land Corp.*, 3 I.C.C.2d 512 (1987).

[7] *Acquisition of Motor Carriers by Railroads*, 1 I.C.C.2d 718 (1984).

[8] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. I.C.C.*, 801 F.2d 1423 (D.C. Cir. 1986).

[9] Finance Docket No. 30900, *Joint Application of CSX Corporation and Sea-Land Corporation Under 49 U.S.C. 11321*, and Finance Docket No. 30900 (Sub-No. 1), *CSX Corporation—Control—Sea-Land Freight Service, Inc., and Intermodal Services, Inc.* (not printed), served October 13, 1987.

American Commercial Lines, Inc. (ACL), the Commission had imposed reporting and oversight conditions designed to monitor the effects of the acquisition on competition.[10] In a third oversight proceeding monitoring the impact of the consolidation, a Chief Administrative Law Judge found no indication that the consolidation had resulted in competitive harm and recommended that the consolidated proceeding not be reopened.[11] The Commission adopted that recommendation.[12]

The Commission additionally accepted for consideration an application filed by CSX and ACL to control SCNO Barge Lines, Inc.[13] Public comments received by the Commission in support of the consolidation were under consideration at the end of the fiscal year.

The Norfolk Southern Corporation (NS) and Lamberts Point Barge Company (LPB) also sought a Commission determination of whether NS's controlling interest in LPB and, in turn, LPB's ownership of a vessel leased under a "demise charter," would contravene the Panama Canal Act regardless of any operation by the demise charterer between rail-served points. Under a demise charter, the owner retains full legal title to a vessel but grants the charterer the exclusive use, possession, and control (of the vessel), subject to certain conditions. That petition was pending at the close of the fiscal year.[14]

To facilitate intermodal operations, the Commission proposed to expand final rules adopted last fiscal year that exempt from regulation under 49 U.S.C. 10505(a) trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) services performed by motor carriers acting as agents for railroads or under joint-rate arrangements with railroads.[15] The proposed revisions would expand the exemption to cover independent motor carrier "pickup and delivery" services arranged independently with a shipper or receiver and performed immediately before or after a TOFC/COFC rail movement. As fiscal year 1988 came to a close, the Commission was considering comments on the proposal.

In the motor area, the Commission approved the acquisition of control of a motor carrier by North American Van Lines, Inc., a subsidiary of the Norfolk Southern Corporation, a noncarrier holding company that also controls two rail carriers.[16] In approving this transaction, the Commission applied the statutory criteria of 49 U.S.C. 11344(c) and (d), as interpreted by the Commission in a 1984 rulemaking proceeding.[17] The Commission concluded that the applicants had shown that use of the acquired motor carrier's service would be to the public advantage in the holding company's overall and intermodal transporation activities,

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[10] *CSX Corporation—Control—American Commercial Lines, Inc.*, 2 I.C.C.2d 490 (1984) *affirmed sub nom., Crounse Corporation v. ICC*, 781 F.2d 1176 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 290 (1986).

[11] Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.* (not printed), served June 9, 1988.

[12] Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.* (not printed), served September 2, 1988.

[13] Finance Docket No. 31247, *CSX Corporation and American Commercial Lines, Inc.—Control—SCNO Acquisition Corporation* (not printed), served July 28, 1988.

[14] Finance Docket No. 31302, *Norfolk Southern Corporation and Lamberts Point Barge Company, Inc.—Petition for Declaratory Order.*

[15] Ex Parte No. 230 (Sub-No. 7), *Improvement of TOFC/COFC Regulations (Pickup and Delivery)* (not printed), served October 29, 1987.

[16] No. MC-F-19734 (Sub-No. 1), *Norfolk Southern Corporation and North American Van Lines, Inc.—Control—Tran-Star, Inc.* (not printed), served April 5, 1988.

[17] Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads*, 1 I.C.C.2d 718 (1984).

and not simply in its rail operations.[18] Although the Commission's interpretation of the statutory criteria had been rejected by a reviewing court,[19] subsequent legislation required the Commission to apply the same interpretation to the involved transaction.[20]

In another proceeding, the Commission considered a plan by Burlington Northern, Inc. (BN), a noncarrier holding company, to divest itself of six motor carriers.[21] Following court reversal of the Commission's decision exempting BN's acquisition of the motor carriers under the exemption authority of 49 U.S.C. 11343(e),[22] BNMC Acquisition Corporation acquired the stock of the six carriers. This acquisition was found to be exempt from Commission jurisdiction under the "single system doctrine."[23] Under this doctrine, the acquisition of control by a noncarrier of a single, integrated, carrier system—as the six involved motor carriers were found to be—is not subject to Commission jurisdiction.

In another significant decision promoting intermodal transportation, the Commission reversed a prior line of cases by ruling that, in rail-motor acquisitions of control involving grants of new authority in licensing proceedings, a separate application for continuance in control will no longer be required.[24] The Commission reasoned that the form and substance of such a transaction was licensing, and that a corporate family would only be acquiring additional operating authority, not control of a carrier. Relying on that decision, the Commission dismissed another petition for exemption from the requirement of prior approval of continuance in control when the ICC concluded that the involved control relationship had been approved in other proceedings, and a corporate family was acquiring only new operating authority.[25]

The Commission also exempted from the requirement of prior approval the acquisition of control by four noncarriers of a water carrier and its motor carrier subsidiaries when it found that the transaction was of limited scope and that the management and control of the water carrier and its subsidiaries would remain unchanged.[26]

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[18] *Ibid.* and *Norfolk Southern*, *supra*.

[19] *International Brotherhood of Teamsters v. ICC*, 801 F.2d 1423 (D.C. Cir. 1986), *rev'd on other grounds*, 818 F.2d 87 (D.C. Cir. 1987).

[20] Section 3403 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-102 (1986).

[21] No. MC-F-19202, *BNMC Acquisition Corporation—Control Exemption—Burlington Northern Motor Carriers, Inc., et al.* (not printed), served August 29, 1988.

[22] *Regular Common Carrier Conf. v. United States*, 801 F.2d 323 (D.C. Cir. 1987).

[23] *BNMC Acquisition*, *supra*, and *Burlington Northern, Inc.—Control & Merger*, 366 I.C.C. 862 (1983), and *Reliance Group Holdings—Petition—Declaratory Order*, 366 I.C.C. 446 (1982).

[24] *White Pass & Yukon Corp.—Cont. Exempt—White P. Transp.* 4 I.C.C.2d 374 (1988).

[25] Finance Docket No. 31142, *KKR Associates and Safeway Stores, Inc.—Continuance in Control Exemption—Safeway Truckings, Inc.* (not printed), served May 26, 1988.

[26] *Zen-Noh Grain Corporation, et al.—Control Exemption—Consolidated Grain and Barge Company, River Bend Transport Company, and River Terminals Transport, Inc.* (not printed), served August 1, 1988.

ENERGY AND ENVIRONMENT

The number and types of proceedings for which environmental documentation was prepared resembled those of past years and dealt mainly with railroad abandonment, mergers, acquisitions, and rail line construction.

Section 106 of the National Historic Preservation Act (NHPA)[1] requires Federal agencies to identify important cultural resources that may be affected by Commission action, assess the extent of that effect, and develop measures to avoid or mitigate any adverse effects. Over the past fiscal year, the number of Comrnission proceedings involving historic-preservation issues increased significantly, especially proceedings involving unique and unusual aspects of the historic-preservation process. Examples of these more complex issues include the Boston and Maine Corporation's abandonment of its Canal Branch railroad line in Connecticut,[2] the Burlington Northern Railroad's abandonment of its rail line from Edgemont to Custer, South Dakota,[3] and the Consolidated Rail Corporation's abandonment of a section of line in New Brunswick, New Jersey.[4]

Proceedings involving implementation of amendments to the National Trails System Act[5] also increased. These amendments[6] give interested parties the opportunity to use, for public recreation purposes, rights-of-way that have been approved for abandonment, while the amendments preserve the same right-of-way for future railroad use. The Commission's interpretation of these amendments in several rail abandonment proceedings has been the vehicle for successfully establishing a number of recreation trails on former railroad rights-of-way. One of the most comprehensive trails established in this way and one that includes many cultural and historic resources is a 200-mile Missouri-Kansas-Texas line in Missouri.[7]

One Commission decision which significantly influenced its policy regarding environmental review procedures was a decision involving an abandonment by the Sierra Railroad Company.[8] In its decision, the Commission stated that in all future railroad abandonment exemptions railroads will be required to file environmental reports. Up until the time this decision was issued, environmental reports complying with Commission regulations[9] were required only in regulated abandonment proceedings.

Just as the Commission's environmental review process has evolved in several important aspects during the past year as indicated by the actions described above, the Commission currently is in the process of re-examining its environmental review procedures. This re-examination is the result of a rulemaking proposed in fiscal year 1987 dealing with the Commission's

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[1]P.L. 89-665.

[2]Docket No. AB-32 (Sub-No. 36X), *Boston and Maine Corporation and Springfield Terminal Railway Company—Abandonment and Discontinuance of Service*. Report Implementing Section 106 of the National Historic Preservation Act, served June 15, 1987.

[3]Docket No. AB-6 (Sub-No. 293X), *Burlington Northern Railroad Company—Abandonment—Edgemont to Custer, SD*. Environmental Assessment, served July 30, 1987.

[4]Docket No. AB-167 (Sub-No. 1085X), *Consolidated Rail Corporation—Exemption Abandonment in Middlesex County, NJ*, served September 11, 1987.

[5]P.L. 95-543.

[6]P.L. 98-11.

[7]Docket No. AB-102 (Sub-No. 13), *Missouri-Kansas-Texas Railroad Company—Abandonment—Machems to Sedalia, MO*. Report Implementing Section 106 of the National Historic Preservation Act, served December 24, 1986.

[8]Docket No. AB-239X, *S.R. Investors, Ltde., Doing Business as Sierra Railroad Company—Abandonments—In Tuolumne County, CA*, served July 20, 1987.

[9]49 CFR 1105.7

policy on class exemptions for rail construction which announced the ICC's plans to undertake a review of its environmental review process and procedures.[10]

[10] Ex Parte No. 392 (Sub-No. 3), *Class Exemption for Rail Construction Under 49 U.S.C. 10901*, served May 29, 1987.

TARIFFS

Fiscal year 1988's 1.4 million common carrier freight tariff filings virtually duplicated the number of tariffs filed with the Commission in fiscal year 1987. The Commission's regular receipt of filings of this magnitude indicates a continuation of the intense rate competition in the transportation industry brought about by deregulatory legislation implemented in 1980.

Motor carrier tariff filings remained constant for the fiscal year at 1.1 million, while railroad tariff filings of more than 62,000 reflected an increase of 33 percent over the 47,000 filings recorded in fiscal year 1987. International ocean/land intermodal tariff filings decreased by 14 percent, to nearly 92,000, and water carrier filings increased by 33 percent, to over 30,000. The total number of passenger tariff filings by all transportation modes increased to 3,100 from the previous year's filing of fewer than 2,500.

The 30,000 new rail contract filings recorded in fiscal year 1988 equaled the number of contract filings in 1987. The steady growth of contract pricing over the past several years indicates that contract pricing is preferred over tariff pricing by a significant segment of the shipping public.

The Commission anticipates that final action will be taken during 1989 in a rulemaking proceeding which seeks to facilitate the filing and maintenance of tariffs in electronic form.[1] Public comments received in the course of this proceeding show strong interest in the use of this new technology as a means for improved business communication in the highly competitive transportation industry. Improved communications will further spur competition between and within carrier modes, and will provide greater benefits to the shipping public and the American consumer.

Informal Rates Cases

The Commission's Bureau of Traffic used its informal procedures to settle 5,778 cases concerning disputes over rate and tariff matters during the last fiscal year. This simple and inexpensive process permitted the settlement of most disputes without the need for the institution of time-consuming and costly formal procedures. Several hundred of the disputes involved freight bill claims by auditors and collection agencies for the alleged improperly underpaid freight bills of bankrupt motor carriers and freight forwarders. The Bureau was successful in showing that many of the claims were not properly supported and, consequently, a number of improper claims against shippers and receivers of freight were withdrawn.

Every person or group, from large corporations to small consumers, has an opportunity to utilize the informal rate settlement process and to receive the same expert assistance that is provided by staff to the Commission in formal rate and tariff matters. A further public gain from informal settlement is the dissemination of a knowledge of pertinent law, of tariff practices, and of each party's rights to prevent the future occurrence of similar disputes.

The Commission's special-docket procedure permits rail and water carriers to seek authority to refund or waive the collection of admittedly unreasonable charges. A total of 485 special-docket cases were processed authorizing reparations and waivers amounting to $5,234,624.

Through the Commission's informal complaint proceedings, rail or

[1] Ex Parte No. 444, *Electronic Filing of Tariffs*.

water shippers may prevent the expiration of the statute of limitations for overcharges or unreasonable charges by writing to the Commission and describing their complaints. If a carrier agrees that a particular movement involves overcharges or that charges are unreasonable, refunds or waivers may be made without the need for formal procedures. The ICC processed four such cases on the informal-complaint docket during fiscal year 1988.

Bureau staff also assisted the Commission in connection with an advanced notice of proposed rulemaking which sought comments regarding the form of publication being used by rail carriers for their cost recovery tariffs.[2] The notice was issued in response to a number of critical comments made to the Commission by shippers contending that the tariffs are too complex and difficult to apply.

Suspension/Special Permission Board

The Suspension/Special Permission Board is an employee board established by the Commission to act initially for the Commission on matters involving carriers' tariffs, rules, rates and charges.

Matters of suspension involve new or revised rates, charges, or rule provisions that are filed with the Commission in tariff form and concern the interstate transportation services provided by the nation's rail, motor, and domestic water carrier industries. Upon the request of interested or affected parties, proposed tariff changes are considered for possible investigation and/or suspension by the Suspension/Special Permission Board, or by the entire Commission. Decisions of the Board are subject to reconsideration by the Commission.

During fiscal year 1988, 170 protests were filed against 52 tariff proposals. Ten proposals were suspended; 22 were permitted to become effective; 12 were permitted to become effective but were investigated; and eight were either canceled by the proposing carrier, rejected by the Commission, withdrawn, or filed too late for consideration. There were five unprotested tariff proposals considered by the Board on its own initiative. Of these proposals, two were suspended, two were permitted to become effective, and one was canceled by the proposing carrier.

In addition, 17 petitions for Commission reconsideration of Board actions were filed requesting the Commission to vacate suspensions and/or to discontinue investigations of certain proposals. Ten of these petitions were granted and seven were denied.

Among the proposals considered were 26 general increases in, or restructurings of, motor common carrier rates and charges filed by regional motor carrier bureaus,[3] and one general increase in rates and charges applicable to household goods shipments which was filed by the Household Goods Carriers' Bureau.

The most significant rail proposal considered by the board was a system-wide switch charge of $450 per car proposed by the Southern Pacific Transportation Company (SPT) to be applicable on line-haul traffic switched solely from or to

[2] Ex Parte No. 290 (Sub-No. 6), *Amendments to Rail Cost Recovery Tariffs*.

[3] Central & Southern Motor Freight Tariff Association, Incorporated; Central States Motor Freight Bureau, Inc.; The Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; The New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference, Inc.

The Atchison, Topeka and Santa Fe Railway Company (ATSF), the Burlington Northern Railroad Company (BN), the Union Pacific Railroad Company (UP), and the Missouri Pacific Railroad Company (MP). The proposal was protested by shippers, shipper associations, and competing railroads. The Board decided to set the matter for investigation,[4] subject to the "keep account" requirements of the Commission's regulations.[5] Acting on a petition from SPT to discontinue the investigation, the Commission denied the petition and broadened the investigation to include comparable "defensive" tariff provisions of ATSF, BN an UP/MP on switch charges to be imposed by these carriers against line-haul traffic of SPT. Issues in this investigation included competitive access,[6] the reasonableness of charges, discrimination between connecting carriers, and a carrier's obligation to provide competitive rail service through reciprocal switching.

Special-permission matters involve applications requesting relief from the Commission's tariff-filing regulations. During fiscal year 1988, the Board considered 115 such applications. Of those, 106 were granted; two were denied, and seven were withdrawn or returned before being decided. As a result of the Commission's modification of procedural rules to encourage pricing innovation and tariff simplification,[7] the number of applications considered by the Commission in fiscal year 1988 declined from that considered in fiscal year 1987.

The Board's decisions in this area continued present, or established new, tariff policy and benefited the public by reducing tariff publishing costs and paperwork and by allowing carriers to react quickly to marketplace opportunities. A number of significant decisions authorized carriers to: (1) implement formulae pricing plans;[8] (2) provide a simplified tariff format based on tariff alpha code identifications;[9] (3) update rail mileage distances by shortened format;[10] and, (4) expedite the issuance of future short-term tariffs by allowing the use of an expanded tariff numbering system.[11]

Of particular significance was the Board authorizing BN to file increased tariff charges on one day's notice, instead of the statutorily required 20 days' notice,[12] to reflect charges that were prepaid by the purchase of BN negotiable certificates of transportation through public tender at market-responsive rates.[13] This decision enabled BN to alter its transportation pricing procedures and was made possible by the Staggers Act.

The Commission's most significant action in the tariff area occurred as the result of an application filed by tariff publishing agents to extend to September 30, 1991, the expiration date of two master tariffs containing rate increases. The Commission's regulations require that increases shown in master-tariff format be incorporated into individual tariffs by the end of the second year

[4]Docket No. 40178, *SP/SSW Switching Charges on Carloads of Grain at Kansas City* and Docket No. 40178 (Sub-No. 1), *Reciprocal Switching Charges, Southern Pacific Company.*

[5]*49 U.S.C. 10707(d)(1).*

[6]See *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985) for competitive access rules.

[7]Docket No. 37321, *Revisions of Tariff Regulations, All Carriers*, served October 1, 1984.

[8]Special Tariff Authority No. 88-1.

[9]Special Tariff Authority No. 88-16.

[10]Special Tariff Authority No. 88-77.

[11]Special Tariff Authority No. 88-82.

[12]See 49 U.S.C. 10762(c)(3).

[13]Special Tariff Authority No. 88-23.

[14]See 49 U.S.C. 10762(d)(2).

after initial publication of an increase, or by the end of the second year after an increase becomes effective, whichever is later.[14] The expiration date of the master tariffs had previously been extended to September 30, 1988.

After seeking public comment, the Commission granted the requested extension, but required participating railroads to submit a tariff updating plan to insure that all rates are updated by September 30, 1991, and to file quarterly progress reports.[15] This decision will benefit the public by shortening the rate-determination process and by simplifying rail tariffs.

[14] See 49 U.S.C. 10762(d)(2).

[15] No. 40154, *Extension of Expiration Date for Master Tariff Increases—Amendments Nos. 5 and 6 to Special Tariff Authority*, served May 27, 1988.


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ENFORCEMENT

The Commission continued to direct its enforcement efforts to coincide with the trend toward reliance on marketplace solutions, rather than regulatory interventions, relative to compliance issues. The Commission's enforcement activities thus were concentrated in those areas in which competition had in some way been lessened, or where assistance was given to parties lacking the resources and leverage needed to independently achieve compliance with the Interstate Commerce Act and the Commission's regulations. Particular enforcement emphasis was also placed upon achieving safe and responsible motor carrier operations. The following discussion of the Commission's enforcement program during the past fiscal year groups pertinent cases under the following three violation categories: (1) consumer and small business, (2) fraudulent activity, and (3) unsafe and uninsured operations. The Commission sought and obtained a large number of consent agreements and court-approved injunctions to ensure future compliance with provisions of both the Interstate Commerce Act and the ICC's regulations, and a total of $66,801 in penalties was collected.

Consumer and Small Business Protection

Included within this program area are cases involving violations of household goods carrier regulations, owner-operator abuses, violations of the Commission's duplicate-payment and loss-and-damage regulations, lumping, and failures by carriers to return charges for service not provided.

In May 1988, Rosendo Diaz, Jr., doing business as Jensen Movers of Philadelphia, Pennsylvania, was permanently enjoined from requiring household goods shippers to pay more than 110 percent of the non-binding estimates of approximate costs for collect-on-delivery shipments before Jensen would release the shipments.[1] Though the Commission's regulations permit final charges to exceed non-binding estimates, the regulations require carriers, upon shipper request, to release shipments upon payment of 110 percent of an estimate, with carrier demand for payment of the balance deferred for 30 days.

In another case involving the transportation of household goods, William L. Cunningham of Houston, Texas, was found in contempt of court for transporting and arranging the transportation of household goods without Commission authority in violation of a 1981 injunction.[2] The court ordered Mr. Cunningham to pay $15,000 in restitution to shippers who used his services, and he was also enjoined from using the trade names of other carriers.

Another case concerning the transportation of household goods involved North Shore Moving & Storage, Inc., of Central Islip, New York, which settled civil forfeiture claims and paid $4,000 in fines for violations of the Commission's household goods loss-and-damage regulations. Evidence gathered by the Commission showed that North Shore had failed to issue bills of lading and orders for service, had failed to honor binding estimates, and had not investigated, acknowledged, nor disposed of loss-and-damage claims.

An injunction was entered against Parker Refrigerated Service,

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[1] *Interstate Commerce Commission* v. *Rosendo Diaz, Jr., d/b/a Jensen Movers & Storage*, Civ. No. 87-2870 (E.D. Pa., May 5, 1988).

[2] *Interstate Commerce Commission* v. *Northline Moving & Storage, Inc., et al.*, Civ. No. H-80-2656 (S.D. Tex., September 2, 1988).

Inc., of Tacoma, Washington, for disregarding the Commission's regulations covering the loss and damage of shippers' goods transported in interstate commerce.[3] The Commission's suit was based on Federal regulations which require that trucking companies must either pay, decline to pay, or make a compromise offer to settle shipper loss-and-damage claims within 120 days after a claim is filed. If a claim cannot be settled or concluded within 120 days, a carrier must notify the claimant of the reason for delay. Under the terms of the injunction in this case, Parker is compelled to abide by the Commission's regulations in the future.

A permanent injunction was entered enjoining Motor Cargo, of Salt Lake City, Utah, from violating Commission regulations governing the processing and refunding of duplicate payments and overpayments.[4] The Commission's duplicate-payments regulations require that carriers establish procedures for the return of freight charges paid in error and act within maximum time limits in the identification, acknowledgement, and disposal of customer claims for the return of overpayments. Under the terms of the injunction, Motor Cargo must establish procedures to identify and properly apply all unidentified payments received from its customers. In addition, Motor Cargo was required to begin refunding identifiable overpayments within 60 days and similarly to dispose of all claims presented by shippers.

In another case involving duplicate payments, Central Transport, Inc., of Sterling Heights, Michigan, and six related companies were enjoined from violating the Commission's duplicate payments regulations.[5] Central and the related companies were ordered to pay approximately $1,673,949 in restitution.

In a similar case, Steve D. Thompson was found in contempt of court for violating a 1986 injunction requiring him to abide by the Commission's duplicate-payment regulations.[6] The court ordered Thompson to pay a $5,000 penalty and to settle all open overcharge claims within six months.

An injunction was entered against Malamute National Lines, Inc., of New York, N.Y., in April 1988 requiring Malamute, a motor common carrier of passengers, to refund all monies due on interstate movements where Malamute had failed to return transportation charges collected when service was not provided.[7] Malamute was also permanently enjoined from engaging in the practice of booking and collecting transportation charges for the interstate movements of passengers, failing to provide the equipment and service paid for by passengers, and then refusing to refund monies collected.

In a case involving owner-operator abuses, Universal Trucking, Inc., of Kokomo, Indiana, was permanently enjoined from failing to pay its equipment lessors for their transportation services within 15 days of their submission of documents necessary to secure payment

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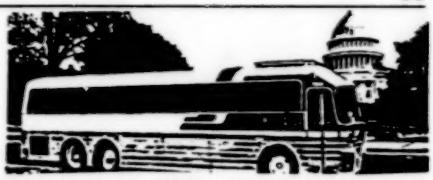
[3] *Interstate Commerce Commission* v. *Parker Refrigerated Service, Inc.*, Civ. No. C87-806TB (W.D. Wash., March 16, 1988).

[4] *Interstate Commerce Commission* v. *Motor Cargo*, Civ. No. 86-C-0639W (D. Utah, January 6, 1988).

[5] *Interstate Commerce Commission* v. *Central Transport, Inc., et al.*, Civ. No. 86 CV-74266 (E.D. Mich., April 21, 1988).

[6] *Interstate Commerce Commission* v. *Steve D. Thompson Trucking, Inc.*, CV-86-2028 (W.D. La., June 6, 1968).

[7] *Interstate Commerce Commission* v. *Malamute National Lines, Inc.*, Civ. No. 88-CIV 1389 (S.D. N.Y., April 28, 1988).



from shippers.[8] Universal was also enjoined from withholding payment based upon anticipated loss-and-damage claims and from using equipment leases which did not meet requirements of the Commission's leasing regulations.

Alex Jakobivitch, doing business as Economy Produce & Vegetable of Cleveland, Ohio, settled civil forfeiture claims and paid a penalty of $1,000 for violating the lumping statute (49 U.S.C. §1110(a)) by requiring owner-operators to use lumpers in the unloading of produce and for not compensating the operators for the cost of these services. In addition, Economy agreed either to permit drivers personally to unload their trucks without cost or penalty or to provide any required unloading assistance at no cost to drivers. Economy also agreed to post a notice on its premises advising drivers of their right to unload their own trucks without cost or penalty.

Fraudulent Activity

Included within this category of fraudulent practices are cases involving bankruptcy fraud, kickbacks, and unethical practice before the Commission.

The Commission continued to uncover instances where attorneys and practitioners had engaged in unethical and fraudulent practices before the Commission. A jury found Donald E. Garrison guilty on 15 counts of an indictment charging him with knowingly and willfully making and using false certificates of shipper witness support in applications for motor carrier authority filed with the Commission.[9] On February 18, 1988, the imposition of a sentence was suspended, Garrison was placed on probation for three years, and was fined $750.

On November 9, 1987, Howard B. Shore of Hopkinton, Massachusetts, was sentenced to one year's probation and fined $12,000 based on a guilty plea to a charge of submitting false income tax returns.[10] Shore had been indicted earlier for failing to report kickbacks he had received in his capacity as a traffic manager and purchasing agent. The kickbacks had been made to influence him to tender interstate freight to a specific trucking company.

The Commission also participated in an investigation with other Federal agencies which resulted in the indictment and conviction of Frank Sarate, Jr., of Paso Robles, California. On January 5, 1988, Sarate was sentenced to serve two years in a Federal prison for violating the U.S. Bankruptcy Code.[11] Prior to his conviction, Sarate had been associated with OTR Freight Systems, Inc. and had been engaged in the provision of freight broker services to and from the Los Angeles area. A Commission investigation found that the underlying rail and motor carriers that provided the transportation for this brokerage operation had lost several million dollars because applicable freight charges were never paid.

Unsafe or Uninsured Operations

All motor carriers seeking operating authority from the Commission must establish that they are fit to conduct the operations they propose and are willing to conform to statutory and administrative

[8] *Interstate Commerce Commisson v. Universal Trucking, Inc.*, Civ. No. 1P 87-238C (S.D. Ind., February 23, 1988).

[9] *United States v. Donald E. Garrison*, Cr. No. 87-93089-01/QV (N.D. Fla., February 18, 1988).

[10] *United States v. Howard B. Shore*, Cr. No. 87-018 (D. R.I., November 9, 1987).

[11] *United States v. Frank Sarate, Jr.*, Cr. No. 87-892-DT (C.D. Cal., January 4, 1988).

requirements, including Federal motor carrier safety regulations. Safety fitness is a primary concern of the Commission, and whenever a motor carrier files an application for either temporary or permanent operating authority, its safety rating is verified with the U.S. Department of Transportation (DOT) by the Commission's field staff. In those situations where an applicant has a less than satisfactory safety rating, that information is made part of the applicant's record for consideration by the Commission.

The Commission's insurance compliance program emphasizes the use of consent agreements to cure insurance deficiencies. The Commission's regulations specify minimum insurance levels for various types of carriers and, when coverage expires or is canceled, the ICC's field staff conducts an investigation. The Commission then seeks voluntary compliance through consent agreements by which involved carriers agree not to operate further until they have obtained appropriate insurance coverage. During fiscal year 1988, the Commission obtained 1,674 consent agreements in insurance cases. Where appropriate, the Commission takes stronger enforcement action for the lack of insurance where carriers fail or refuse to obtain prescribed insurance. During the past fiscal year, 72 injunctions were obtained against such carriers lacking adequate insurance.

The Commission additionally conducts follow-up investigations to ensure that such carriers are complying with consent agreements and injunctions and that they are conducting interstate operations with appropriate insurance coverage. Carriers which continue to operate without adequate insurance are subject to appropriate remedial action, including contempt actions.

In June 1988, Eastern Tank Lines, Inc., and John E. Luscaleet of Dayton, Ohio, were held in civil contempt for violating a permanent injunction which had enjoined Eastern from operating in interstate commerce without having required insurance coverage in effect and on file with the Commission.[12] The contempt order provided for fines of $500 and up to 30 days' incarceration for Luscaleet for any further uninsured transportation.

In a similar case, Pat Wiggin, both as an individual and doing business as P.M. Trucking of Champlain, Minnesota, was held in contempt of court and served two days in a Federal detention facility for violating a permanent injunction. That injunction had prohibited him from transporting household goods in interstate commerce without adequate public liability insurance in effect and on file with the Commission.[13]

In yet another contempt proceeding, a judgment of civil contempt was entered against Fay L. Sims, doing business as Scenicland Buses of Chattanooga, Tennessee, for performing six motor bus transportation operations in interstate commerce in violation of a permanent injunction issued May 23, 1986, which had prohibited uninsured interstate operations by Scenicland.[14] A civil penalty of $1,500 was assessed.

In another contempt proceeding, Roberto Flores and Luz C. Flores

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[12] *Interstate Commerce Commission* v. *Eastern Tank Lines, Inc.*, Civ. No. C-3-87-145 (S.D. Ohio, June 9, 1988).

[13] *Interstate Commerce Commission* v. *Pat Wiggin, an individual, and d/b/a P.M. Trucking*, Civ. No. 4-85-1659 (D. Minn., November 10, 1987).

[14] *Interstate Commerce Commission* v. *Fay L. Sims, d/b/a Scenicland Motors, Inc. and Scenicland Buses*, Civ. No. 1-86-216 (E.D. Tenn., February 17, 1988).

of Chicago, Illinois, were found in contempt of court for transporting passengers without Commission operating authority or required levels of insurance in violation of a 1982 injunction.[15] Mr. Flores was ordered to pay a $2,000 fine and was ordered to jail until it was paid. Mr. Flores also was ordered to sell the vehicle in which the transportation at issue had been provided.

Safety Fitness Procedures

Each Commission field office checks the safety ratings of all carriers within its jurisdiction which are submitting applications for operating authority or which are attempting to transfer authorities, and Department of Transportation (DOT) audit reports are ordered for all applicants possessing less than satisfactory DOT safety ratings. A summary of the authority sought as well as a description of violations discovered in the DOT audit report are then submitted to the Commission's Office of Proceedings in Washington, D.C., within the applicable comment or protest period. This step is taken to advise the Commission that the safety fitness of an applicant may be at issue. In the case of a transfer proceeding, where a transferor's DOT rating is less than satisfactory, the Commission's Office of Compliance and Consumer Assistance (OCCA) only notifies the Office of Proceedings if there is a discernable nexus between the operations of the transferor and the transferee. The OCCA takes no further action unless ordered to do so by the Commission.

If the Commission directs the OCCA to participate in an application proceeding, that Office conducts a limited inquiry to obtain safety-related information concerning an applicant which has been compiled by other organizations, such as state departments of transportation, state divisions of motor vehicles, and insurance companies. In a typical proceeding, the Commission provides an applicant the opportunity to submit information supporting its current safety compliance. Where justified, the OCCA presents the evidence it has obtained in the form of a rebuttal statement challenging an applicant's claim of improved safety compliance.

[15] *Interstate Commerce Commission v. Roberto Flores and Luz C. Flores, individually and d/b/a Microbuses Modernas de Laredo*, Civ. No. 82-C-5847 (N.D. Ill., January 5, 1988).

FINANCIAL OVERSIGHT

The Commission's financial oversight activities include accounting and reporting, financial analysis, cost analysis, cost development, and auditing. These functions involve the preparation, amendment, and interpretation of prescribed accounting and financial reporting rules; the examination and analysis of accounts and financial statements; the analysis of cost and financial evidence submitted by parties to proceedings before the Commission; and the compilation and publication of transportation statistics and cost studies.

Accounting and Reporting Rulemaking

The Commission's prescribed accounting and reporting systems are continually reviewed to provide current useful information. This review program includes updating to correspond with generally accepted accounting principles (GAAP), and to reduce reporting burdens while retaining those requirements which provide data needed by the Commission.

The Commission continued its efforts to reduce the accounting and reporting requirements for property and passenger motor carriers. The classification limits for determining the reporting classes for accounting and reporting for motor carriers of passengers were revised. Class I bus carriers now include those whose annual operating revenues are $5 million or more, instead of the former $3-million level, and that limit will be indexed each year to offset inflationary effects. This change will eliminate the reporting burden of approximately 11 passenger carriers.[1]

For property carriers, substantial reporting reductions were decided last fiscal year,[2] but petitioners such as the American Trucking Associations and others requested, and were granted, a stay of a Commission decision to reduce the reporting burden.[3] These petitioners had wanted increased reporting data items, the retention of the uniform accounting system, and accounting and reporting prescription for Class II motor carriers. After intensive consideration, the Commission decided to reduce the Annual Report Form M to 10 pages and the Quarterly Report Form QFR to three pages, continue to prescribe the present accounting system, and subject Class II motor carriers to reporting requirements.[4]

The Commission also proposed that each Class I railroad be required to have an independent public accountant review its depreciation study;[5] currently, each Class I railroad is required to submit a depreciation study for equipment every three years and a depreciation study for roadbed property every six years. Under this proposal, an independent public accountant would prepare and submit to the Commission on a railroad's behalf a report which would address whether the railroad's study was undertaken in conformance with Commission regulations and instructions. This proposal is currently pending before the Commission.

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[1]Docket No. 39953 (Sub-No. 1), *Revision to the Accounting and Reporting Requirements for Motor Carriers of Passengers*, served February 11, 1988.

[2]Docket No. 38904, *Elimination of Accounting and Reporting Requirements for Motor Carriers of Passengers*, ____ ICC 2d ____, served March 31, 1987.

[3]Docket No. 38904, *Elimination of Accounting and Reporting Requirements for Motor Carriers of Property*, (not printed), served May 4, 1987.

[4]Docket No. 38904, *Elimination of Accounting and Reporting Requirements for Motor Carriers of Property*, ____ ICC 2d ____, served October 12, 1988.

[5]Ex Parte No. 468, *Review of Railroad Depreciation Studies by Independent Public Accountants*, (not printed), served April 29, 1988.

The Commission additionally proposed an accounting modification for railroads which would reduce the burden associated with accounting for minor items of property.[6] Currently, small items costing $2,000 and less may be expensed rather than capitalized. The new rule proposes that expensing may be elected for property items costing up to $3,200. Capitalization of small property items is burdensome because these items have to be booked, tracked, and written off over a period of time. A final rule on this matter will be issued in the near future.

The Commission also adopted the Rail Accounting Principles Board's (RAPB) Data Integrity Principle, which will serve to increase the reliability and verification of audited data.[7] An attestation standard was added, as well, to assure certification of reported data.

Also concerning railroads, the Commission proposed to improve its revenue adequacy standard by calculating return on investment (ROI) on a combined/consolidated system basis, adding working capital interest income to the ROI calculation, and excluding income taxes associated with nonoperating income from the ROI computation.[8] These changes would be accomplished by adding a new schedule to railroad Annual Report Form R-1.

Cost and Financial Analysis

The Commission analyzed cost and financial evidence submitted by the railroads and other entities in connection with rates charged for the transportation of coal and other bulk commodities. Two such proceedings involved application of the Commission's Coal Rate Guidelines.[9] In one case, the Commission determined that a coal shipper had been charged transportation rates which did not exceed a maximum reasonable level.[10] In the other case, no market dominance was found by the Commission.[11]

In a related rate area, the Commission requested comments in several proceedings involving application of its Non-Coal Rate Guidelines in determining maximum rate reasonableness.[12] Revenue-to-variable cost ratios were employed by the Commission in its evaluation of four such proceedings in which decisions where rendered.[13]

The Commission analyzed cost and financial evidence submitted in connection with railroad applications to abandon selected line segments. These analyses took into account the avoidable loss or gain

[6]Docket No. 40047, *Revision to Minimum Rule for Railroads' Property Units*, (not printed), served July 19, 1988.

[7]Docket No. 40165, *Adoption of the Rail Accounting Principles Board's Recommendation on its Data Integrity Principle in Reports Prepared Using Agreed-Upon Procedures*, (not printed), served August 12, 1988.

[8]Ex Parte No. 393 (Sub-No. 2), *Supplemental Reporting of Consolidated Information for Revenue Adequacy Purposes*, (not printed), served February 11, 1988.

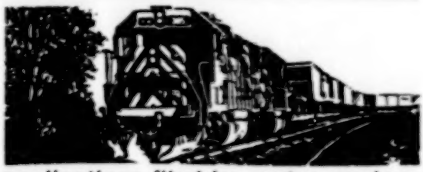
[9]Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines—Nationwide*, 1 I.C.C. 2d 520 (1985).

[10]Docket No. 37931, *Metropolitan Edison Company v. Conrail et al.*, (not printed), served July 27, 1988.

[11]Docket No. 38301 (Sub-No. 1), *Westmoreland Coal Sales Company v. Denver & Rio Grande Western Railroad Company, et al.*, (not printed), served September 2[illegible], 1988.

[12]Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines—Non-Coal Proceedings* (not printed), served May 21, 1986, and April 8, 1987.

[13]Docket No. 38239S, *Amstar Corporation v. The Alabama Great Southern Railroad et al.* (not printed), served December 2, 1987; Docket No. 37478, *Amstar Corporation v. The Atchison Topeka and Santa Fe Railway Company, et al.* (not printed), served December 8, 1987; Docket No. 40073, *South-West Railroad Car Parts Company v. Missouri Pacific Railroad Company* (not printed), served March 16, 1988; and Docket Nos. 37809, 37809 (Sub-No. 1), and 37815S, *McCarty Farms, et al. v. Burlington Northern Inc.; McCarty Farms, Inc. v. Burlington Northern Railroad Company*; and *Montana Dept of Agriculture, et. al. v. Burlington Northern Inc.*, 4 I.C.C. 2d 262 (1988), served February 12, 1988.



which would result from each abandonment through the determination of applicable revenues and avoidable costs.[14]

Last fiscal year, the Commission additionally determined that the railroad industry's 1987 cost of capital rate was 11.6 percent.[15] This was the first cost of capital determination to use the Commission's expedited procedures to ensure that a cost of capital decision is served by June 30 of the year following that for which a determination is being made.[16]

Concerning railroad revenue adequacy, the Commission also determined that none of the nation's Class I railroads were revenue adequate during 1987, since their individual rates of return on net investment in transportation property were less than the cost of capital determined for the industry for that year.[17]

The Commission was active, too, in the institution of rulemakings to modify its regulations for abandonments and light-density surcharges.[18] These modifications reflect findings by the RAPB, and public comments on these proposed modifications are currently being reviewed.

The Commission analyzed financial data included in the many applications filed by motor carriers of property requesting approval for self-insurance for bodily injury and property damage claims and/or cargo claims. In performing these analyses, the Commission evaluated (1) whether each applicant had the financial resources to fund its proposed self-insurance program; (2) whether additional data were needed properly to analyze specific proposals; (3) whether approval of a self-insurance plan was warranted (including considerations of conditions or restrictions to ensure the availability of sufficient resources to pay claims for statutory minimum-coverage levels); and, (4) whether grounds existed for the denial of an application.

The Commission evaluated the financial condition of large transportation companies to determine whether they were financially able to provide adequate service to shippers. Reports were again publicly released each quarter which showed the latest quarter's and twelve months' earnings, traffic volume, and the rate of return data for Class I railroads, 100 of the nation's largest trucking companies, 15 of the largest household goods carriers, and 10 of the largest bus companies.

Cost Development

The Railroad Accounting Principles Board completed its review of the Uniform Railroad Costing System (URCS)[19] and issued a final report on September 1, 1987. The RAPB recommended that within 18 months the variability factors underlying the URCS should be subjected to an independent review and

[14] Ex Parte No. 274, *Revisions of Abandonment Regulations*, 49 C.F.R. 1152, effective January 3, 1984.

[15] Ex Parte No. 473, *Railroad Cost of Capital—1987*, ____ I.C.C. 2d ____, served June 6, 1988.

[16] Ex Parte No. 466 (Sub-No. 1), *Railroad Cost of Capital—Proposed Expedited Procedures*, ____ ICC 2d ____, served July 1, 1987.

[17] Ex Parte No. 476, *Railroad Revenue Adequacy—1987 Determination*, ____ I.C.C. 2d ____, served July 22, 1988.

[18] Ex Parte No. 274 (Sub-No. 11A), *Abandonment Regulations—Costing (Implementation of the Railroad Accounting Principles Board Findings)* (not printed), served May 13, 1988; and Ex Parte No. 402, *Reasonably Expected Costs (Implementation of the Railroad Accounting Principles Board Findings)* (not printed), served May 13, 1988.

[19] Ex Parte No. 431, *Adoption of Uniform Rail Costing System for Determining Variable Costs for Jurisdictional Threshold and Surcharge Purposes* (not printed), served November 13, 1984.

that the implementation of the URCS should be delayed until this independent review has been completed. The recommended review was completed in June 1988, and a final report was released to the public for informal comment.[20] The comment period concerning the report ended on August 31, 1988, and variability factors are now being finalized. Revised variability factors soon will be released for formal comment, and a proposal will be advanced for the adoption of the URCS for all regulatory general-purpose costing. It is expected that this rulemaking will be completed within the 18-month period recommended by the RAPB.

The Commission issued four quarterly Rail Cost Adjustment Factor (RCAF) decisions as a part of its new general-increase procedures. Additionally, a bank of credits established to hold down rates expired, and maximum RCAF rate levels began to rise and fall with the level of the quarterly RCAF. The first downward revision took effect on July 1, 1988.

The Staggers Act requires the Commission to calculate an annual Cost Recovery Percentage (CRP) which serves as the threshold for the regulation of market-dominant rail traffic if the calculated CRP falls between 170 and 180 percent. The Commission issued a decision retaining the calculation currently in use for 1987,[21] and comments received in that proceeding supported continued use of that calculation. The threshold currently remains unchanged at 180 percent.

Auditing

Each Class I railroad is required to submit a report from an independent accountant stating that specified data in the railroad's "R-1" Annual Report of finances and operations have been examined, using agreed-upon procedures, and have been found in compliance with the Uniform System of Accounts for Railroad Companies.[22] The accountant's report on the R-1 is also required to present any material exceptions which may have come to the accountant's attention during the examination. The Commission reviewed the working papers of independent accountants for each Class I railroad to determine compliance, and also reviewed the working papers of independent accountants engaged to review the procedures used by Class I railroads and the Association of American Railroads (AAR) in developing the AAR Index used to calculate the RCAF. The purpose of this review was to ensure the accuracy and reliability of the procedures and the source data used in the development of the index.

The Commission also investigated transactions between and among railroads and their affiliated companies to determine the impact of such transactions on the railroads' financial condition.

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[20] *Research Report on URCS Regression Equations*, M. Daniel Westbrook, Ph.D., July 1988.

[21] Ex Parte No. 399, *Cost Recovery Percentage* (not printed), served December 24, 1987.

[22] Ex Parte No. 460, *Certification of Railroad Annual Report R-1 By Independent Accountants*, 1 I.C.C.2d 902 (1985).

COURT ACTIONS

During the past fiscal year, the Commission's litigation continued to focus on the implementation of the Staggers Rail Act of 1980 and the Motor Carrier Act of 1980. There was no significant litigation, however, involving the Bus Regulatory Reform Act of 1982. These amendments to the Interstate Commerce Act, along with subsequent Commission adjudications and rulemakings, gave rise to court decisions that have significantly affected the nation's surface transportation industry and the public it serves.

During fiscal year 1988, the Commission's Office of the General Counsel represented the agency in 400 cases in the Federal courts. Of these, 291 were pending at the beginning of the fiscal year, and 109 additional cases were instituted during the year. As of September 30, 1988, the courts had concluded 85 cases, leaving 315 cases pending in various stages of litigation. Of the cases concluded, four were done so by the Supreme Court, 71 by the Federal Courts of Appeals, and 10 by the Federal District Courts. The more significant decisions are discussed below.[1]

In the rail area, labor, environmental, and accounting issues dominated judicial review of Commission decisions. The Commission's role in exempting from regulatory approval transactions involving the sale of existing rail lines to new entrants,[2] despite affirmance by the D.C. Circuit,[3] has continued to engender much litigation. Several rail labor unions have continued their attempt to block sales transactions approved by the Commission.[4] Rail labor has sought to have the courts hold that the consummation of these sales transactions, without prior negotiations with employees, violates either the Railway Labor Act (RLA),[5] or state fraudulent conveyance statutes.[6]

The Commission's position is that the Interstate Commerce Act vests the Commission with exclusive and plenary authority[7] over the sale of rail properties and, thus, Commission authorization of such transactions supersedes all other law, including the RLA and the Norris-Laguardia Act, (NLGA),[8] when those laws act as obstacles to the consummation of a Commission-approved transaction.[9]

The courts have, with two exceptions,[10] upheld the Commission's interpretation of its authority and the Interstate Commerce Act's supersession of the RLA. However, the 8th Circuit Court of Appeals[11] has joined the Third Circuit[12] in declaring that, absent an express statutory exemption provision,[13] the

[1] Some of the litigation involved non-transportation matters, such as Equal Employment Opportunity Act complaints, government contract matters, Freedom of Information Act appeals, and Equal Access to Justice Act claims. Because these cases have no direct impact on the development of transportation regulatory law and were not of any broad significance otherwise, they are not discussed here.

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), 49 U.S.C. 10901.

[3] *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

[4] *Burlington Northern RR. v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1987); *RLEA v. Pittsburgh & Lake Erie RR.*, 845 F.2d 420 (3rd Cir. 1988) (*P&LE II*); *RLEA v. Pittsburgh & Lake Erie RR.*, 831 F.2d 1231 (3d Cir. 1987) (*P&LE I*); *RLEA v. Chicago & North Western Transportation Co.*, 855 F.2d 1277 (7th Cir. 1988).

[5] 45 U.S.C. 145 *et seq.* See *P&LE II*, *supra*.

[6] See, e.g., *Deford v. Soo Line RR. Co.*, 87-5376 MN (8th Cir. 1988).

[7] *Chicago & North Western Transportation Co. v. Kalo Brick & Tile*, 450 U.S. 311 (1981).

[8] 29 U.S.C. 101 *et seq.*

[9] *Missouri Pacific R. Co. v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[10] See *P&LE II*, *supra*, and *RLEA v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988).

[11] *Burlington Northern v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1988).

[12] *P&LE II*, *supra*.

[13] Such as that present in 49 U.S.C. 11341(a).

NLGA prevents entry of an injunction against strikes which negate an authorized transaction or undermine Commission resolution of labor disputes arising out of an authorized transaction. The issue of the Interstate Commerce Act's supersession of the RLA and NLGA is likely to engage the attention of the Supreme Court in fiscal year 1989. Several petitions for writs of certiorari have been filed with the Court by the Commission, among others, seeking review of this issue.[14]

Also in the rail area, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a commission decision[15] exempting abandonment of those out-of-service rail lines over which no traffic has traveled for at least two years, or over which only overhead traffic has moved.[16] The exemption also extended to discontinuances of rail service and rail trackage rights.

In another case involving the class exemption for abandonment of out-of-service lines, the Second Circuit affirmed the Commission positions that the National Environmental Policy Act (NEPA)[17] and the National Historic Preservation Act (NHPA)[18] do not require the Commission's environmental review to be completed prior to publication of a notice of exemption, that the National Trails System Act[19] is voluntary, and that a 180-day delay in imposing a public-use condition is the limit of the Commission's powers under the Interstate Commerce Act's public-use provision, 49 U.S.C. 10906.[20]

In several decisions, the courts examined and largely affirmed the validity of the Commission's Trails Act Rules.[21] These rules, which set forth procedures for prospective trail users and railroads voluntarily to enter into interim trails-use agreements, reflect the Commission's position that interim trail use should not be mandatory. The Second Circuit,[22] in affirming a Commission decision applying the Trails Act Rules,[23] rejected a challenge to the constitutionality of the Trails Act.

The D.C. Circuit reviewed the Commission's Trails Act Rules last fiscal year and found "entirely reasonable" the Commission's decision that the Trails Act authorizes only voluntary transfers of rights-of-way.[24] In so doing, it joined the Ninth and Second Circuit Courts of Appeals in affirming the Commission's view that the Trails Act is not coercive.[25] It disagreed, however, with the Commission's conclusion that the application of its rules could never constitute a taking of the reversionary interests of property owners.[26] The court remanded the case "so that the

[14] See e.g., *ICC v. RLEA and Pittsburgh & Lake Erie RR. Co., No. 88-217* (August 5, 1988); *RLEA v. Chicago & North Western Transportation Co., No. 78-2049* (June 14, 1988); *ICC v. UTU and Burlington and Northern RR. Co., No. 88-711* (October 27, 1988).

[15] Ex Parte No. 274 (Sub-No. 8), et al., *Exemption of Out-of-Service Rail Lines*, 2 I.C.C.2d 146 (1986).

[16] *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988).

[17] 42 U.S.C. §4332 (1982).

[18] 16 U.S.C. §470f (1982).

[19] 16 U.S.C. §1247(d).

[20] *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479 (2d Cir. 1988).

[21] Ex Parte No. 274 (Sub-No. 13), *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986).

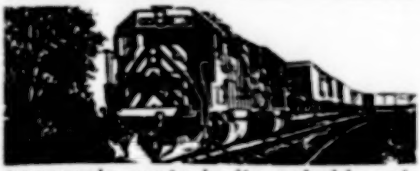
[22] *Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988).

[23] Docket No. AB-265 (Sub-No. 1X), *State of Vermont Railway, Inc.—Discontinuance of Service Exemption in Chittenden County, Vt.*; Finance Docket No. 30702, *Trustee of the Diocese of Vermont, et al. v. State of Vermont and Vermont Railway, Inc.*, 3 I.C.C.2d 903 (1987).

[24] *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988).

[25] *See Washington State Department of Game v. ICC, supra*, 829 F.2d 877 (9th Cir. 1987); *Connecticut Trust for Historic Preservation v. ICC, supra*, 841 F.2d 479 (2d Cir. 1988).

[26] *National Wildlife Federation v. ICC*, 850 F.2d 78 (3d Cir. 1988).



Commission can reconsider its rules in light of their possible effect upon the interests of reversionary owner."[27]

The Third Circuit handed down an important decision[28] affirming in all respects the Commission's most recent refinements to the ICC's revenue adequacy standard.[29] In upholding the Commission's decision and rejecting shipper challenges, the court effectively retained the cost of capital as the single measure of revenue adequacy, adhered to the current cost of debt as opposed to the cost of embedded debt in computing the cost of capital, did not require exclusion from the investment base of assets not used or useful in the railroad industry, and adopted a transition method of accounting for the change from betterment to depreciation accounting for track structures. The court also rejected the railroads' challenge to the Commission's decision to exclude reserves for deferred taxes from the investment base for revenue adequacy determination.

Also in the area of rail accounting, the D.C. Circuit affirmed in part and remanded in part[30] the Commission's accounting standards[31] for determining costs and return on value in rail abandonment and subsidy proceedings. Specifically, the court upheld the Commission's (1) adoption of the "real" (inflation excluded) cost of capital in computing economic costs in its subsidy calculation; (2) retention of the same standard in computing opportunity costs in abandonment cases; and (3) use of its Northeast Regional Subsidy Standards[32] to calculate train supplies, expenses, and locomotive fuel costs, and to allocate a share of off-branch costs to lines proposed for abandonment or subsidy. With the exception of the Commission's classification of return on investment equipment as an economic cost, the court affirmed the Commission's regulations.

The D.C. Circuit additionally affirmed[33] a Commission decision altering the rules governing cost recovery rate increases for railroads.[34] The Commission's decision revised the cost recovery rules by adopting procedures to account for forecasting errors, and by requiring that rail rates contained in cost recovery tariffs be reduced when costs go down. In so doing, however, the Commission set a floor on the level to which reductions would be ordered that recognized the railroads' practical inability to re-create old cost recovery tariffs that had already become part of their basic rate structures. The court, in rejecting shipper claims that the Commission had acted improperly in adopting the floor for rate rollbacks and in refusing to make up for prior cumulative forecast error, found that the Commission had acted reasonably and fairly in interpreting a complicated statute during a period of changing economic conditions.

Finally in the rail area, the U.S. Court of Appeals for the District of

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[27] Ibid.

[28] *Consolidated Rail Corp. v. ICC*, 855 F.2d 78 (3d Cir. 1988).

[29] Ex Parte No. 393 (Sub-No. 1), *Standards for Railroad Revenue Adequacy*, 3 I.C.C.2d 261 (1986). This decision partially revised the Commission decision in Ex Parte No. 393 (Sub-No. 1), *Standards for Railroad Revenue Adequacy*, *364 I.C.C. 803 (1981)*, affirmed by the Third Circuit in *Bessemer and Lake Erie R. Co. v. ICC*, 691 F.2d 1104 (3d Cir. 1982), *cert. denied*, 462 U.S. 1110 (1983).

[30] *Association of American Railroads v. ICC*, 846 F.2d 1465 (D.C. Cir. 1988).

[31] Ex Parte No. 274 (Sub-No. 1), *Abandonment Regulations—Costing*, 3 I.C.C.2d 340 (1957).

[32] 49 C.F.R. 1155.

[33] *Alabama Power Co. v. ICC*, 852 F.2d 1361 (D.C. Cir. 1988).

[34] Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures*, 3 I.C.C.2d 60 (October 17, 1986); (unprinted decision served Dec. 18, 1986).

Columbia Circuit affirmed a Commission decision[35] denying the complaint of shippers which had sought a uniform nationwide prescription of car-hire allowances for covered hopper cars, as well as damages of approximately $1 billion for past allowances allegedly below the level required by 49 U.S.C. 11122(b).[36] The D.C. Circuit also affirmed[37] the first Commission decision[38] applying the standards and procedures for handling "competitive access" issues.[39]

In the motor carrier area, questions of collectively set single-line rates and of the Commission's authority to establish exceptions to the filed-rate doctrines predominated. The D.C. Circuit again affirmed the Commission's implementation of the ban on collective single-line ratemaking in the motor carrier industry. The court criticized the rate bureaus for a "frivolous" interpretation of the statute[40] banning collective single-line ratemaking by motor carriers.[41] In another decision involving collective ratemaking, the Sixth Circuit[42] affirmed the Commission's rejection[43] of two attempts by motor carriers to set collectively the prices they charge various customers for pickup-and-delivery service. The court found the Commission's definition of a "single line rate"[44] to be "a reasonable interpretation of the statutory language,"[45] and held that the Commission's interpretation of Section 10706(b)(3)(D) was in accord with the statutory policy, the legislative history, and the post-enactment statements of the Motor Carrier Ratemaking Study Commission.

In a second important area of decisions involving motor carriers, the U.S. District Court for the Northern District of Ohio reversed[46] a Commission determination that a carrier's collection of undercharges would constitute an unreasonable practice.[47] In ruling that a shipper must pay undercharges, the court observed that a lower rate which had been negotiated by a shipper and carrier had not been the rate filed at the Commission. While noting that Commission decisions are normally given deference, the court relied on an ICC decision which provides that agency opinions in negotiated rates cases are advisory only.[48] The court concluded that the filed-rate doctrine is settled law and must be strictly construed, regardless of the circumstances involved in any specific case. In another case involving similar facts, however, the U.S. District Court for the Western District of Missouri determined that Commission deci-

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[35]No. 39117, *Lo Shippers Action Committee v. Aberdeen and Rockfish Ry. Co.*, 4 I.C.C.2d 1 (1987).

[36]*Lo Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

[37]*Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

[38]Ex Parte No. 445 (Sub-No. 1), *Intramodal Rail Competition* (not printed), served March 28, 1985.

[39]Codified at 49 CFR 1144.

[40]49 U.S.C. 10706(b)(3)(D).

[41]*Clark & Reid Co. v. United States*, 851 F.2d 1468 (D.C. Cir. 1988).

[42]*Central & Southern Motor Freight Tariff Association, Inc. v. United States*, 843 F.2d 886 (6th Cir. 1988).

[43]I&S Docket No. M-30374, *Collectively Set Delivery Charges at Eastern Kentucky, CSMFTA*; I&S Docket No. M-30376, *Pickup and Delivery at Private Residences, CSMFTA*, October 1985.

[44]The Commission defined "single-line rate" as "a rate for service performed wholly by one carrier as opposed to a rate for service performed by two or more carriers." *Collective Ratemaking Procedures—Niagara Frontier Tariff Bureau, Inc.*, 1 I.C.C.2d 317 (1984), *aff'd per curiam, Niagara Frontier Tariff Bureau, Inc. v. United States*, 780 F.2d 109 (D.C. Cir. 1986).

[45]*Central & Southern Motor Freight Tariff Association, Inc. v. United States, supra*, 843 F.2d at 891.

[46]*Delta Traffic Service, Inc. v. Synthetic Products Company*, No. C87-1630 (N.D. Ohio May 12, 1988).

[47]No. MC-C-30066, *Synthetic Products Company—Petition for Declaratory Order.*

[48]Ex Parte No. MC-177, *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

sions concerning negotiated rates should be accorded substantial deference.[49] That court barred the collection of undercharges where the Commission had found that carrier collection of more than the changes negotiated by the parties would constitute an unreasonable practice.

[49]*Maislin Industries, U.S., Inc. et al. v. Primary Steel*, No. 85-0021-CV-W-JWO (W.D. Mo., July 22, 1988), appeal pending, No. 88-2267-WM (8th Cir.).

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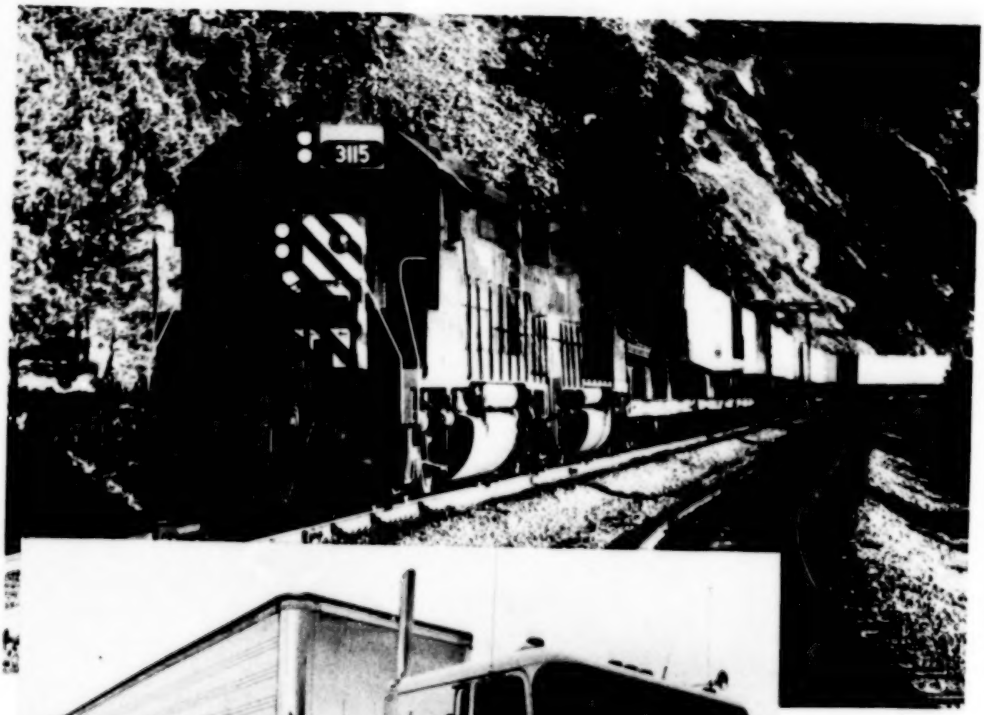
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APPENDIX A

Commission Organization

The major bureaus and offices of the Commission are listed below. Heads of each bureau or office report to the Chairman via the channels indicated on the organization chart.

STAFF OFFICIALS

Office of the Chairman:
- *Chief of Staff* ..... David M. Konschnik
- *Senior Staff Counsel* ..... Jule R. Herbert, Jr.

Office of Government and Public Affairs:
- *Director* ..... Alexander H. Jordan

Office of Public Assistance:
- *Director* ..... Samuel E. Eastman
- *Deputy Director* ..... Dan G. King

Office of Human Relations:
- *Director* ..... Alexander W. Dobbins

Office of the Managing Director:
- *Managing Director* ..... Edward E. Guthrie
- *Director, Personnel Office* ..... Richard H. Mooers
- *Chief, Budget and Fiscal Office* ..... Anthony Jacobik, Jr.
- *Chief, Administrative Services* ..... Virgil L. Schultz
- *Chief, Systems Development* ..... Edward F. Welkner

Office of the Secretary:
- *Secretary* ..... Noreta R. McGee
- *Assistant Secretary* ..... Kathleen M. King

Office of the General Counsel:
- *General Counsel* ..... Robert S. Burk
- *Deputy General Counsel for Research and Legislation* ..... Daniel D. Campbell
- *Deputy General Counsel* ..... Henri F. Rush
- *Associate General Counsel* ..... Ellen D. Hanson
- *Deputy Associate General Counsel* ..... John J. McCarthy, Jr.
- *Deputy Associate General Counsel* ..... Craig M. Keats

Office of Proceedings:
- *Director* ..... Jane F. Mackall
- *Deputy Director, Section of Railroads* ..... Joseph H. Dettmar
- *Deputy Director, Section of Motor Carriers* ..... Richard B. Felder

Office of Transportation Analysis:
Director ..... John F. Hennigan, Jr.
Associate Director ..... Leland L. Gardner
Chief, Section of Rail Services Planning ..... Michael E. Sullivan
Chief, Section of Energy and Environment ..... Carl P. Bausch
Chief, Section of Research and Analysis ..... Michael A. Redisch

Office of Hearings:
Chief Administrative Law Judge ..... Paul S. Cross

Bureau of Accounts:
Acting Director ..... Daniel D. Campbell

Office of Compliance and Consumer Assistance:
Director ..... Bernard Gaillard
Associate Director ..... William J. Love
Deputy Director, Section of Operations ..... Heber P. Hardy
Deputy Director, Section of Enforcement ..... Charles E. Wagner

Bureau of Traffic:
Director ..... Neil S. Llewellyn
Chief, Section of Rates and Informal Cases ..... Lawrence C. Herzig
Chief, Section of Tariffs ..... Charles E. Langyher, III

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS–Continued

Eastern Region

Regional Headquarters .....Richard M. Biter
Regional Director
Room 16400
3535 Market St.
Philadelphia, PA 19104

Atlanta .....Suite 360
Peachtree 25th Bldg.
1718 Peachtree St., N.W.
Atlanta, GA 30309

Baltimore .....1025 Fallon Federal Bldg.
Charles Center
31 Hopkins Plaza
Baltimore, MD 21201

Boston .....Room 1015
Boston Federal Office Bldg.
10 Causeway St.
Boston, MA 02222

Charlotte .....Room CC-516
Mart Office Bldg.
800 Briar Creek Rd.
Charlotte, NC 28205

Cleveland .....Room 913
Celebrezze Federal Bldg.
1240 E. 9th St.
Cleveland, OH 44119

Jacksonville.....Suite 233
4057 Carmichael Ave.
Jacksonville, FL 32207

New York .....Room 1807
Jacob K. Javits Federal Bldg.
26 Federal Plaza
New York, NY 10278

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS–Continued

Central Region

Regional Headquarters .....William Redmond, Jr.
Regional Director
Room 1304
Everett McKinley Dirksen Bldg.
Chicago, IL 60604

Fort Worth .....Suite 510
411 W. 7th St.
Ft. Worth, TX 76102

Indianapolis.....Room 429
Federal Bldg. & U.S. Courthouse
46 E. Ohio St.
Indianapolis, IN 46204

Kansas City .....2111 Federal Bldg.
911 Walnut St.
Kansas City, MO 64106

Minneapolis.....Room 475
Federal Bldg. and U.S. Courthouse
110 S. Fourth St.
Minneapolis, MN 55401

New Orleans .....T-3015 Federal Bldg. and
U.S. Post Office
701 Loyola Ave.
New Orleans, LA 70113

Omaha .....Room 728
Federal Office Bldg.
106 S. 15th St.
Omaha, NE 68102

St. Louis .....Room 1161
210 N. Tucker Bldg.
St. Louis, MO 63101

DIRECTORY OF INTERSTATE COMMERCE COMMISSION FIELD OFFICES AND REGIONAL HEADQUARTERS–Continued

Western Region

Regional Headquarters .....John H. Kirkemo
Regional Director
Suite 500
211 Main St.
San Francisco, CA 94105

Denver .....Room 440, Drawer #3548
Federal Office Bldg.
1961 Stout St.
Denver, CO 80294

Los Angeles .....1321 Federal Bldg.
300 N. Los Angeles St.
Los Angeles, CA 90012

Phoenix .....3415 Federal Bldg.
230 N. First Ave.
Phoenix, AZ 85025

Salt Lake City .....2419 Federal Bldg.
125 State St.
Salt Lake City, UT 84138

Seattle .....858 Federal Bldg.
915 Second Ave.
Seattle, WA 98174

INTERSTATE COMMERCE COMMISSIONERS
1887-1987

Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
1. COOLEY, Thomas M.	Mich.	Rep.	Mar. 31, 1887	Jan. 12, 1892
2. MORRISON, William R.	Ill.	Dem.	Mar. 31, 1887	Dec. 31, 1897
3. SCHOONMAKER, Augustus	N.Y.	Dem.	Mar. 31, 1887	Dec. 31, 1890
4. WALKER, Aldace F.	Vt.	Rep.	Mar. 31, 1887	Mar. 31, 1889
5. BRAGG, Walter L.	Ala.	Dem.	Mar. 31, 1887	Aug. 21, 1891
6. VEAZEY, Wheelock G.	Vt.	Rep.	Sept. 10, 1889	Dec. 20, 1896
7. KNAPP, Martin A.	N.Y.	Rep.	Mar. 2, 1891	Dec. 12, 1910
8. McDILL, James W.	Iowa	Rep.	Jan. 13, 1892	Feb. 28, 1894
9. CLEMENTS, Judson C.	Ga.	Dem.	Mar. 17, 1892	June 18, 1917
10. YEOMANS, James D.	Iowa	Dem.	May 2, 1894	Mar. 6, 1905
11. PROUTY, Charles A.	Vt.	Rep.	Dec. 21, 1896	Feb. 2, 1914
12. CALHOUN, William J.	Ill.	Rep.	Mar. 21, 1898	Sept. 30, 1899
13. FIFER, Joseph W.	Ill.	Rep.	Nov. 4, 1899	Dec. 30, 1905
14. COCKRELL, Francis M.	Mo.	Dem.	Mar. 11, 1905	Dec. 31, 1910
15. LANE, Franklin K.	Calif.	Dem.	July 2, 1906	Mar. 5, 1913
16. CLARK, Edgar E.	Iowa	Rep.	July 31, 1906	Aug. 13, 1921
17. HARLAN, James S.	Ill.	Rep.	Aug. 28, 1906	Dec. 31, 1918
18. McCHORD, Charles C.	Ky.	Dem.	Dec. 31, 1910	Jan. 1, 1926
19. MEYER, Balthasar H.	Wis.	Rep.	Dec. 31, 1910	Apr. 30, 1939
20. MARBLE, John H.	Calif.	Dem.	Mar. 10, 1913	Nov. 21, 1913
21. HALL, Henry C.	Colo.	Dem.	Mar. 21, 1914	Jan. 13, 1928
22. DANIELS, Winthrop M.	N.J.	Dem.	Apr. 6, 1914	July 1, 1923
23. AITCHISON, Clyde B.	Oreg.	Rep.	Oct. 5, 1917	July 10, 1952
24. WOOLLEY, Robert W.	Va.	Dem.	Oct. 5, 1917	Dec. 31, 1920
25. ANDERSON, George W.	Mass.	Dem.	Oct. 15, 1917	Nov. 5, 1918
26. EASTMAN, Joseph B.	Mass.	Ind.	Feb. 17, 1919	Mar. 15, 1944
27. FORD, Henry J.[1]	N.J.	Dem.	June 11, 1920	Mar. 4, 1921
28. POTTER, Mark W.	N.Y.	Dem.	June 24, 1920	Feb. 20, 1925
29. ESCH, John J.	Wis.	Rep.	Mar. 28, 1921	May 29, 1928
30. CAMPBELL, Johnston B.	Wash.	Rep.	May 5, 1921	Jan. 6, 1930
31. LEWIS, Ernest I.	Ind.	Rep.	May 5, 1921	Dec. 31, 1932
32. COX, Frederick I.	N.J.	Rep.	Sept. 1, 1921	Dec. 31, 1926
33. McMANAMY, Frank	D.C.	Dem.	June 28, 1923	Apr. 30, 1939
34. WOODLOCK, Thomas F.	N.Y.	Dem.	Apr. 1, 1925	Aug. 31, 1930
35. TAYLOR, Richard V.	Ala.	Dem.	Jan. 16, 1926	Dec. 31, 1929
36. BRAINERD, Ezra, Jr.	Okla.	Rep.	Feb. 23, 1927	Dec. 31, 1933
37. PORTER, Claude R.	Iowa	Dem.	Jan. 28, 1928	Aug. 17, 1946
38. FARRELL, Patrick J.	D.C.	Dem.	June 7, 1928	Dec. 31, 1934
39. LEE, William E.	Idaho	Rep.	Jan. 18, 1930	Aug. 18, 1953

Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
40. TATE, Hugh M.	Tenn.	Rep.	Feb. 28, 1930	Sept. 16, 1937
41. MAHAFFIE, Charles D.	D.C.	Dem.	Sept. 2, 1930	Dec. 31, 1954
42. MILLER, Carroll	Pa.	Dem.	June 14, 1933	Dec. 24, 1949
43. SPLAWN, Walter M.W.	Tex.	Dem.	Feb. 1, 1934	June 30, 1953
44. CASKIE, Marion M.	Ala.	Dem.	Aug. 26, 1935	Mar. 31, 1940
45. ROGERS, John L.	Tenn.	Rep.	Sept. 16, 1937	Apr. 30, 1952
46. ALLDREDGE, J. Haden	Ala.	Dem.	May 1, 1939	Oct. 31, 1955
47. PATTERSON, William J.	N.D.	Ind.	July 31, 1939	July 10, 1953
48. JOHNSON, J. Monroe	S.C.	Dem.	June 3, 1940	June 4, 1956
49. BARNARD, George M.	Ind.	Rep.	Dec. 2, 1944	Jan. 2, 1949
50. MITCHELL, Richard F.	Iowa	Dem.	Feb. 3, 1947	June 15, 1959
51. CROSS, Hugh W.	Ill.	Rep.	Apr. 11, 1949	Nov. 25, 1955
52. KNUDSON, James K.	Utah	Rep.	Apr. 20, 1950	May 22, 1954
53. ELLIOTT, Kelso	Ind.	Rep.	July 10, 1952	Feb. 29, 1956
54. ARPAIA, Anthony F.	Conn.	Dem.	July 11, 1952	Mar. 15, 1960
55. CLARKE, Owen	Wash.	Rep.	July 10, 1953	Jan. 15, 1958
56. FREAS, Howard G.	Calif.	Rep.	Aug.18, 1953	Dec. 31, 1966
57. TUGGLE, Kenneth H.	Ky.	Rep.	Sept. 8, 1953	July 31, 1975
58. WINCHELL, John H.	Colo.	Rep.	July 28, 1954	Apr. 3, 1961
59. HUTCHINSON, Everett	Tex.	Dem.	Feb. 1, 1955	Mar. 31, 1965
60. MURPHY, Rupert L.	Ga.	Dem.	Dec. 30, 1955	Aug. 31, 1978
61. MINOR, Robert W.	Ohio	Rep.	Feb. 15, 1956	Sept. 30, 1958
62. WALRATH, Laurence K.	Fla.	Dem.	Mar. 29, 1956	June 30, 1972
63. McPHERSON, Donald P., Jr	Pa.	Rep.	June 4, 1956	Mar. 29, 1963
64. GOFF, Abe McGregor	Idaho	Rep.	Feb. 12, 1958	July 30, 1967
65. WEBB, Charles A.	Va.	Rep.	Sept. 30, 1958	Mar. 31, 1967
66. HERRING, Clyde E.	Iowa	Dem.	Sept. 21, 1959	May 25, 1964
67. BUSH, John W.	Ohio	Dem.	Apr. 3, 1961	Nov. 2, 1972
68. TUCKER, William H.	Mass.	Dem.	Apr. 3, 1961	Dec. 31, 1967
69. TIERNEY, Paul J.	Md.	Rep.	Mar. 29, 1963	Feb. 28, 1970
70. BROWN, Virginia Mae	W.Va.	Dem.	May 25, 1964	July 23, 1979
71. DEASON, Willard	Tex.	Dem.	Sept. 8, 1965	July 31, 1975
72. STAFFORD, George M.	Kans.	Rep.	Apr. 26, 1967	Aug. 31, 1980
73. SYPHERS, Grant E.	Calif.	Rep.	July 31, 1967	Feb. 5, 1968
74. HARDIN, Dale W.	Ill.	Rep.	July 31, 1967	Aug. 31, 1977
75. BURKE, Wallace R.	Conn.	Dem.	Aug. 21, 1968	June 28, 1969
76. JACKSON, Donald L.	Calif.	Rep.	Mar. 20, 1969	June 30, 1972
77. GRESHAM, Robert C.	Md.	Rep.	Dec. 15, 1969	June 18, 1982
78. BREWER, W. Donald	Colo.	Rep.	July 23, 1970	June 30, 1974
79. WIGGIN, Chester M., Jr.	N.H.	Rep.	Oct. 24, 1972	July 31, 1973
80. McFARLAND, Alfred T.	Tenn.	Ind.	Nov. 1, 1972	Nov. 10, 1977
81. MONTEJANO, Rodolfo[1]	Calif.	Dem.	Nov. 3, 1972	Mar. 2, 1973
82. O'NEAL, A. Daniel, Jr.	Wash.	Dem.	Apr. 12, 1973	Dec. 31, 1979
83. CLAPP, Charles L.	Mass.	Rep.	Mar. 14, 1974	Mar. 19, 1982

Interstate Commerce Commissioners	State	Party	Oath of Office	End of Service
84. CORBER, Robert J.	Va.	Rep.	Mar. 13, 1975	Dec. 1, 1976
85. CHRISTIAN, Betty Jo	Tex.	Dem.	Apr. 7, 1976	Dec. 31, 1979
86. TRANTUM, Thomas A.	Conn.	Rep.	July 23, 1979	July 31, 1981
87. GASKINS, Darius W.	D.C.	Dem.	July 23, 1979	Feb. 1, 1981
88. ALEXIS, Marcus	Ill.	Dem.	Aug. 27, 1979	June 30, 1981
89. GILLIAM, Reginald E.	Va.	Dem.	Apr. 21, 1980	Feb. 1, 1983
90. TAYLOR, Reese H., Jr.	Nev.	Rep.	June 25, 1981	Dec. 31, 1985
91. STERRETT, Malcolm M.B.	Md.	Rep	Feb. 12, 1982	Aug. 11, 1988
92. ANDRE, Frederic N.[2]	Ind.	Rep.	Mar. 19, 1982	
93. SIMMONS, J.J. III[2,3]	Okla.	Dem.	Apr. 27, 1982 Sept. 10, 1984	Feb. 28, 1983
94. GRADISON, Heather J.[2]	Ohio	Rep.	June 18, 1982	
95. LAMBOLEY, Paul H.[2]	Nev.	Dem.	Sept. 11, 1984	
96. STRENIO, Andrew J., Jr.	Md.	Dem.	Sept. 14, 1984	Dec. 31, 1985
97. PHILLIPS, Karen B.[2]	Va.	Rep.	Aug. 11, 1988	

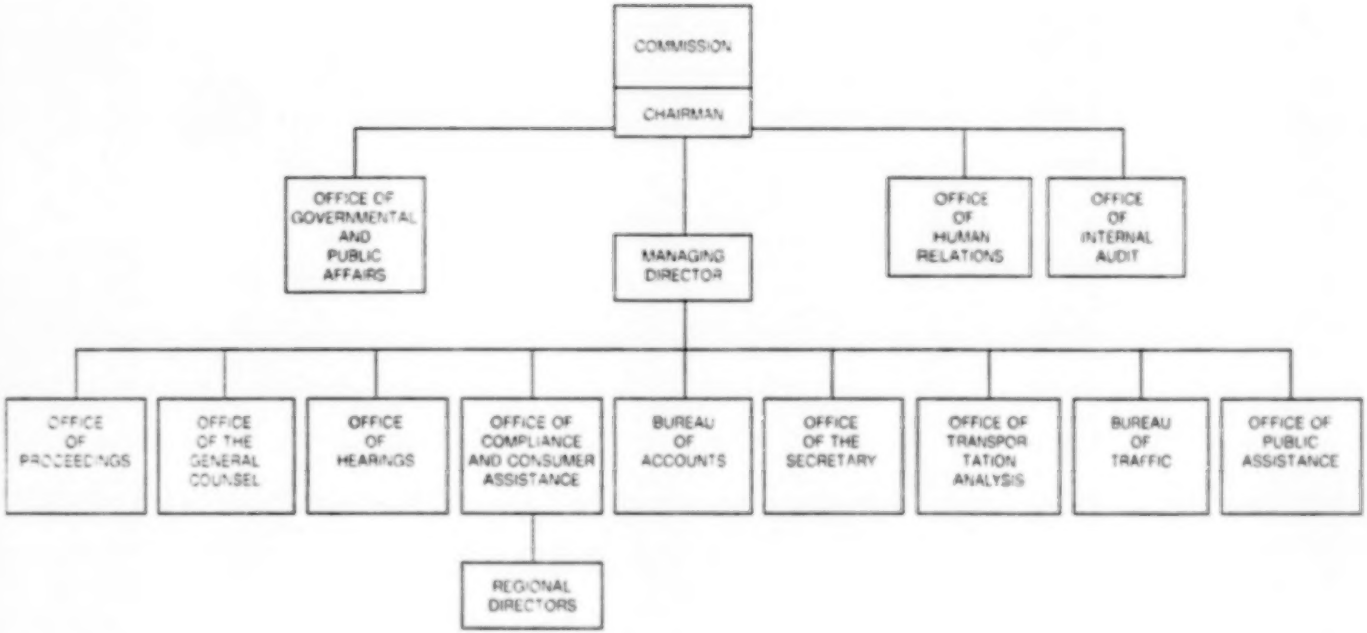
[1]Recess appointment only, not confirmed.

[2]Currently serving.

[3]Commissioner Simmons resigned as a Commission member in February 1983 following his confirmation as Under Secretary of the Department of the Interior. He rejoined the Commission in September 1984 following his Presidential appointment and Senate confirmation.

INTERSTATE COMMERCE COMMISSION

Organizational Chart



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APPENDIX B

Commission Workload

Table 1.—Distribution by method of disposition of Office of Proceedings cases opened and closed during fiscal year 1988.

Motor Matters

Case Type	Open-ings	Closings			
		Opposed	Un-opposed	Dismissed/ Rejected/ With-drawn	Total
Rulemakings	10	14	0	0	14
Motor Property Licensing:					
Initial Common	2,961	8	2,900	36	2,944
Initial Contract	6,342	68	6,243	28	6,339
Extension Common	613	12	630	8	650
Extension Contract	578	27	607	6	640
Motor Passenger Licensing:					
Initial Common	572	4	572	8	584
Initial Contract	40	1	34	0	35
Extension Common	66	10	64	0	74
Extension Contract	4	0	3	0	3
Passenger Carrier Exit	0	0	0	0	0
Water Carrier Licensing	14	0	10	7	17
Freight Forwarder Licensing	45	0	47	4	51
Property Broker Licensing:					
Initial	2,198	4	2,193	20	2,217
Extension	43	0	39	0	39
Motor Carrier Complaints:					
Rate-Ex Parte MC-177	35	41	0	0	41
Interstate/Intrastate	6	6	0	0	6
Other	6	9	0	0	9
Restriction Removal	9	0	6	3	9
Investigation & Suspension	12	11	0	0	11
Motor Rate	13	12	0	0	12
Passenger Rate Review	2	2	0	0	2
Motor Carrier Finance	257[1]	13	219	28	260
Small Carrier Transfer	624[2]	2	704	18	724
Motor Finance Temporary Authority	175	0	178	7	185
Rate Bureau	0[3]	5	5	2	12[4]
Other Motor Matters	23	2	10	14	26
Totals	14,348	251	14,464	189	14,904

[1]Includes 237 exemptions according to docket Ex Parte 55 (Sub-No. 57).
[2]Includes 256 applications processed under exemption rules according to docket Ex Parte 55 (Sub-No. 57A).
[3]No new rate bureau applications were filed during the year. However, the Commission received and approved a jointly-filed application of two rate bureaus to amend their respective rate bureau agreements to incorporate an interterritorial agreement. In addition, the Commission received and is considering the joint application of two rate bureaus for merger of their presently overlapping territories and memberships.
[4]The Commission granted final approval in 10 proceedings and revoked the antitrust immunity in two other proceedings. The Commission also provisionally approved agreements in eight proceedings and continued provisional approval in eight others.

Rail Matters

Case Type	Openings[1]	Pending	Decisions[2]	
			Procedural	Substantive
Rulemakings	21	44	10	55
Abandonments (Non-NERSA)[3]	42	19	27	144
Abandonments (Conrail under NERSA)	8	1	0	18
Abandonment exemptions[4]	130	34	3	309
Rates: Complaints, declaratory orders, investigations and rate bureau activity	19	53	121	69
Investigation and suspensions.	0	0	0	0
Exemptions	12	3	0	12
Finance Docket: exemptions	169	59	27	202
Finance Docket: other[5]	48	54	97	65
Totals	449	267	285	874

[1]Excludes filings rejected by letter, reopenings, and court remands.

[2]Where a single decision has embraced proceedings, that decision is counted only once. Ministerial corrections, notices of court action, or miscellaneous notices are not included in these totals. This is a change from prior-years' tabular formats.

[3]North East Rail Service Act.

[4]Includes petitions and notices of exemption.

[5]Includes mergers and consolidations, feeder-line acquisitions, arbitration review proceedings, petitions seeking declaratory orders, and other financial transactions.

Table 2.—Rulemaking and Ex Parte Proceedings Pending and Closed During Fiscal Year 1988 (*indicates actions completed)

RAILROADS

Ex Parte No. 230 (Sub-No. 7)	Improvement of TOFC/COFC Regulations (Pickup and Delivery)
Ex Parte No. 270 (Sub-No. 5)	Investigation of Railroad Freight Rate—Scrap Iron & Steel
Ex Parte No. 270 (Sub-No. 6)	Investigation of Railroad Freight Rate—Scrap Iron & Steel
*Ex Parte No. 274 (Sub-No. 3E)	Abandonment of Rail Lines—Use of Opportunity Costs
*Ex Parte No. 274 (Sub-No. 3F)	Abandonment of Rail Lines—Use of Opportunity Costs
Ex Parte No. 274 (Sub-No. 8)	Exemption of Out-of-Service Rail Lines
Ex Parte No. 274 (Sub-No. 10A)	Environmental Compliance Out-of-Service Rail Line Exemptions
Ex Parte No. 274 (Sub-No. 11)	Abandonment Regulations—Costing
Ex Parte No. 274 (Sub-No. 11A)	Abandonment Regulations—Costing (Implementation of RAPB Findings)
Ex Parte No. 274 (Sub-No. 11B)	Abandonment Regulations—Costing (Revised Treatment of Return on Investment-Equipment)
*Ex Parte No. 274 (Sub-No. 12A)	Rail Abandonments—Public Use Conditions
*Ex Parte No. 274 (Sub-No. 12B)	Rail Abandonments—Environmental and Historic Preservation Conditions
Ex Parte No. 274 (Sub-No. 13)	Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures
*Ex Parte No. 274 (Sub-No. 16)	Exemption of Rail Line Abandonments or Discontinuances—Offers of Financial Assistance
Ex Parte No. 274 (Sub-No. 18)	Rail Abandonments—Consideration of Possible Sale or Subsidy or Rail Line in Analysis of an Abandonment Application under 49 U.S.C. 10903
Ex Parte No. 274 (Sub-No. 19)	Increasing the Offer of Financial Assistance Purchase Price to Compensate for Tax Liability Incurred on the Sale of Personal Property
Ex Parte No. 274 (Sub-No. 20)	Rail Abandonments—Avoidability of Property Tax Expense Under the Unit Method of Assessment
Ex Parte No. 290 (Sub-No. 2)	Railroad Cost Recovery Procedures
Ex Parte No. 290 (Sub-No. 4)	Railroad Cost Recovery Procedures—Productivity Adjustment Factor
Ex Parte No. 290 (Sub-No. 5)	Quarterly Rail Cost Adjustment Factor
Ex Parte No. 290 (Sub-No. 6)	Amendments to Rail Carrier Cost Recovery Tariffs
Ex Parte No. 319	Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities

Table 2.—Rulemaking and Ex Parte Proceedings Pending and Closed During Fiscal Year 1988—Continued.

RAILROADS—Continued

Ex Parte No. 319 (Sub-No. 1)	Further Investigation of Freight Rates for the Transportation of Recyclables or Recycled Material
*Ex Parte No. 328	Investigation of Tank Car Allowance System
Ex Parte No. 334 (Sub-No. 6)	Review of Car Hire Regulations
Ex Parte No. 346 (Sub-No. 14A)	Rail General Exemption Authority—Agricultural Commodities Exemption
*Ex Parte No. 346 (Sub-No. 19A)	Petition for Exemption—Boxcar Provisions—Delaware Otsego
Ex Parte No. 346 (Sub-No. 23)	Railroad Exemption—Filing Quotations Under Section 10721
Ex Parte No. 346 (Sub-No. 24)	Rail General Exemption Authority—Miscellaneous Manufactured Commodities
Ex Parte No. 347 (Sub-No. 1)	Coal Rate Guidelines—Nationwide
Ex Parte No. 347 (Sub-No. 2)	Rate Guidelines—Non-Coal Proceedings
Ex Parte No. 349	Increased Freight, Rates and Charges, 1978, Nationwide
Ex Parte No. 357	Increased Freight Rates and Charges 1980,—8 Percent
Ex Parte No. 375 (Sub-No. 1)	Increased Freight Rates and Charges—1980 Nationwide Phase II
Ex Parte No. 386	Increased Freight Rates and Charges—Nationwide—1981
*Ex Parte No. 387	Railroad Transportation Contracts
Ex Parte No. 387 (Sub-No. 961)	Petition to Disclose Long-Term Rail Coal Contracts
Ex Parte No. 388[1]	State Intrastate Rail Rate Authority
*Ex Parte No. 392 (Sub-No. 1)	Class Exemption for the Acquisition and Operation of Rail Line Under 49 U.S.C. 10901
Ex Parte No. 392 (Sub-No. 2)	Class Exemption for the Construction of Connecting Tracks 49 U.S.C. 10901
Ex Parte No. 392 (Sub-No. 3)	Class Exemption for Rail Construction
Ex Parte No. 393 (Sub-No. 2)	Supplemental Reporting of Consolidated Information for Revenue Adequacy Purposes
*Ex Parte No. 394 (Sub-No. 3)	Cost Ratios for Recyclables—1987 Determination
Ex Parte No. 394 (Sub-No. 4)	Cost Ratios for Recyclables—Compliance Procedures
Ex Parte No. 394 (Sub-No. 5)	Cost Ratios for Recyclables—1988 Determination
Ex Parte No. 399	Cost Recovery Percentage

[1]Sub 2, Arkansas; Sub 7, Illinois; Sub 26, Oklahoma; and Sub 33, Virginia.

Table 2.—Rulemaking and Ex Parte Proceedings Pending and Closed During Fiscal Year 1988—Continued.

RAILROADS—Continued	
Ex Parte No. 402	Reasonably Expected Costs (Implementation of the Railroad Accounting Principles Board Findings)
*Ex Parte No. 406	Electronic Transmission of Freight Bills
Ex Parte No. 431	Adoption of the Uniform Railroad Costing System for Determining Variable Costs for the Purpose of Surcharge and Jurisdictional Threshold Calculations
Ex Parte No. 444	Electronic Filing of Tariffs
Ex Parte No. 445 (Sub-No. 2)	Intramodal Rail Competition—Proportional Rates
Ex Parte No. 462	Exemption of Demurrage from Regulation
Ex Parte No. 466 (Sub-No. 1)	Railroad Cost of Capital—Proposed Expedited Procedures
Ex Parte No. 468	Review of Railroad Depreciation Studies by Independent Accountants
Ex Parte No. 473	Railroad Cost of Capital—1987
Ex Parte No. 474	Exemption from 49 U.S.C. 11322(A)—For Interlocking Directorates
Ex Parte No. 476	Railroad Revenue Adequacy—1987 Determination
*No. 40165	Adoption of the Railroad Accounting Principles Board's Recommendation on its Data Integrity Principles in Reports Prepared Using Agreed Upon Procedures
*No. 37321 (Sub-No. 2)	Revision of Tariff Regulations - Computer determination of Mileages

Table 2.—Rulemaking and Ex Parte Proceedings Pending and Closed During Fiscal Year 1988—Continued.

TRUCK AND BUS COMPANIES

*Ex Parte No. 55 (Sub-No. 64)	ICC FOIA Fee Schedule Revision
*Ex Parte No. 55 (Sub-No. 65)	Applications for Motor Common Carrier Authority to Transport Passengers—Recipients of Governmental Financial Assistance
Ex Parte No. 55 (Sub-No. 66)	Freedom of Information Act Predisclosure Notification Procedures—Confidential Commercial Information
Ex Parte No. 55 (Sub-No. 67)	Non-Rail Interpretations and Routing Regulations
*Ex Parte No. 55 (Sub-No. 68)	Revised Procedures for Obtaining Copies of Motor Carrier, Water Carrier, Property Broker, and Household Goods Freight Forwarder Applications
*Ex Parte No. 246 (Sub-No. 5)	Regulations Governing Fees for Services Performed in Connection with Licensing and Related Service - 1987 Update
*Ex Parte No. 246 (Sub-No. 6)	Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services - 1988 Update
*Ex Parte No. 297 (Sub-No. 7)	Motor Carrier Rate Bureaus—Expansion of Collective Ratemaking Territory
*Ex Parte No. 342	Procedures Governing the Processing, Investigation, and Distribution of Overcharge, Duplicate Payment, or Overcollection Claims—Petition for Modification
*Ex Parte No. 467	Exemption of Water Carrier Operations
Ex Parte No. 470	In the Matter of William Sheridan
*Ex Parte No. 471	Copies of Pleadings
*Ex Parte No. 475	Designation of Office to Receive Petitions for Review of Agency Orders
*Ex Parte No. MC-1	Payments of Rates and Charges of Motor Carriers
*Ex Parte No. MC-5 (Sub-No. 8)	Property Broker Security for the Protection of the public

Table 2.—Rulemaking and Ex Parte Proceedings Pending and Closed During Fiscal Year 1988—Continued.

TRUCK AND BUS COMPANIES—Continued

Ex Parte No. MC-37 (Sub-No. 40)	Commercial Zones and Terminal Areas
*Ex Parte No. MC-42	Handling of C.O.D. Shipments
*Ex Parte No. MC-61	Practices of Motor Common Carriers of Household Goods
*Ex Parte No. MC-111 (Sub-No. 1)	Transfers of Operating Rights
*Ex Parte No. MC-142 (Sub-No. 4)	Revision of Licensing Procedures to Include Applications for Removal of Restrictions from Authorities of Motor Carriers of Property and Passengers—Removal of 49 CFR Part 1165
*Ex Parte No. MC-183	Clarification of Insurance Regulation
*Ex Parte No. MC-188	Petition for Investigation of Indemnification and Hold-Harmless Clauses
*Ex Parte No. MC-189	Agricultural Commodities Exemption
*Ex Parte No. MC-190	Elimination of Accounting and Reporting Requirements for Private Carriers
Ex Parte No. MC-191	Credit and Freight Bill Collection Practices of Household Goods Motor Common Carriers
*No. 37321 (Sub-No. 1)	Revision of Tariff Regulations—Computer Determination of Mileages
*No. 37321 (Sub-No. 2)	Revision of Tariff Regulations—Computer Determination of Mileages
*No. 38904	Elimination of Accounting and Reporting Requirements for Motor Carriers of Property
*No. 39953 (Sub-No. 1)	Revision to the Accounting and Reporting Requirements for Motor Carriers of Passengers

Table 3.—Informal Proceedings

	Fiscal Year 1986	Fiscal Year 1987	Fiscal Year 1988
Applications for motor temporary authority			
Filed	2,636	3,172	3,538
Disposed of	2,608	3,155	3,552
Pending at end of year	167	184	170
Petitions in applications for motor temporary authority (received at ICC headquarters)			
Filed	5	8	8
Disposed of	13	8	8
Pending at end of year	0	0	1

Table 4[1].—Abandonments, Construction, Acquisitions and Operations, Consolidations, Trackage Rights, and Leases[2]

	Fiscal Year 1986		Fiscal Year 1987		Fiscal Year 1988	
	Number	Miles	Number	Miles	Number	Miles
1. Abandonments:						
Applications filed	141	1,890	60	1,208	50	1,470
Granted	117	1,417	60	818	47	1,293
Denied	4	148	2	32	3	33
Dismissed	2	74	3	196	5	90
Dismissed because of sale	9	201	8	72	4	110
Petitions for exemptions filed	93	861	73	817	46	737
Granted	56	324	88	976	43	807
Denied	0	0	0	0	0	0
Dismissed	4	6	5	28	3	33
Dismissed because of sale	0	0	0	0	0	0
Notices of exemptions filed	30	221	50	476	84	1,183
Granted	43	346	27	138	71	897
Dismissed	6	53	2	37	13	298
Dismissed because of sale	0	0	0	0	0	0
2. Construction:						
Applications filed	0	0	0	0	0	0
Granted	1	11	1	58	0	0
Denied	0	0	0	0	0	0
Dismissed	1	7	0	0	0	0
Petitions for exemptions filed	N/A	N/A	N/A	N/A	3	8
Granted	N/A	N/A	N/A	N/A	3	8
Denied	N/A	N/A	N/A	N/A	0	0
Dismissed	N/A	N/A	N/A	N/A	0	0

[1]Table 4 has been expanded this year to include individual petitions for exemptions for Abandonments and Construction; notice of exemption for abandonments and Acquisitions and Operations; Consolidations, including both applications and petitions for exemption; and Trackage Rights. However, this table does not report exempt transactions under 49 CFR 1180.2(d)(3)(7)—transactions within a corporate family, renewal of leases, joint relocation projects, reincorporation, and renewal of trackage rights.

[2]No formal leasing applications were filed, granted, denied or dismissed during fiscal year 1988. Figures for previous years are not available.

Table 4 (Cont'd).—Abandonments, Construction, Acquisitions and Operations, Consolidations, Trackage Rights, and Leases[2]

	Fiscal Year 1986		Fiscal Year 1987		Fiscal Year 1988	
	Number	Miles	Number	Miles	Number	Miles
3. Acquisitions and Operations:						
Applications filed	0	0	0	0	0	0
Granted	1	15	0	0	0	0
Denied	0	0	0	0	0	0
Dismissed	0	0	0	0	0	0
Notices of exemptions filed	N/A	N/A	N/A	N/A	58	2,822
Granted	N/A	N/A	N/A	N/A	58	5,581
Dismissed	N/A	N/A	N/A	N/A	1	13
4. Consolidations[3]						
Applications filed	N/A	N/A	N/A	N/A	6	15,174
Granted	N/A	N/A	N/A	N/A	3	14,998
Denied	N/A	N/A	N/A	N/A	3	N/A
Dismissed	N/A	N/A	N/A	N/A	0	0
Petitions for exemptions filed	N/A	N/A	N/A	N/A	19	1,264
Granted	N/A	N/A	N/A	N/A	17	1,617
Denied	N/A	N/A	N/A	N/A	0	0
Dismissed	N/A	N/A	N/A	N/A	0	0
Trackage Rights:						
Application filed	N/A	N/A	N/A	N/A	7	N/A
Granted	N/A	N/A	N/A	N/A	3	N/A
Denied	N/A	N/A	N/A	N/A	16	N/A
Dismissed	N/A	N/A	N/A	N/A	1	N/A

[3]Mileages may not reflect terminal lines.

Table 5.—Tariff Schedules, Fiscal Year 1988

	Received	Criticized	Rejected
Freight			
Common Carrier Tariffs:			
Rail	62,364	89	334
Motor	1,193,132	3,891	9,475
Water	30,221	15	100
Freight Forwarder	275	0	3
International ocean-land intermodal	91,918	0	0
Total common carrier	1,377,910	3,955	9,912
Contract Carrier Filings:			
Rail Contracts	29,946	0	38
Rail Summaries	31,881	1,743	35
Passenger Tariffs:			
Rail	1	0	0
Motor	2,990	62	56
Water	178	0	0
Total passenger	3,169	62	56
Grand total	1,442,906	5,800	10,041

Table 6.—Action taken on proposals (protested and non-protested) considered for suspension and/or investigation.

	Suspensions—Fiscal Year 1988				
	Rail	Motor	Water	Total	Percent
Suspended	0	12	0	12	21
*Not suspended or investigated	6	18	0	24	42
*Not suspended but investigated	5	7	0	12	21
**Otherwise disposed of	5	3	1	9	16
Total	16	40	1	57	100

*Permitted to become effective.

**Proposed provisions canceled or rejected; protests withdrawn or filed too late.

Table 7.—Informal Rate Cases Branch (Bureau of Traffic—Fiscal Year 1988)

Rate cases general:	
On hand at beginning of year	140
Received during year	5755
Disposed of during year	5778
Pending at end of year	117
Informal complaints and statements of claimed damages:	
On hand beginning of year	1
Received during year	6
Disposed of during year	4
Pending at end of year	3
Special docket cases:	
On hand beginning of year	24
Received during year	469
Disposed of during year	485
Pending at end of year	8

Table 8.—ICC Unit Of The National Defense Executive Reserve (NDER)

NDER Group	Fiscal Year 1986 On Roll	Fiscal Year 1987 On Roll	Fiscal Year 1988 On Roll
Rail	390	388	383
Motor	99	99	94
Water	33	28	28

Table 9.—Car Supply, Retired and Ordered, Class I Railroads

	Fiscal Year			
	1973	1978	1983	1988
Cars Installed:				
Box	14,128	7,203	612	0
Refrigerator	2,749	15	0	0
Gondola	4,384	2,492	281	175
Hopper	3,353	11,421	1,519	150
Covered Hopper	7,685	4,987	262	795
Flat	1,221	1,967	338	502
Other	602	40	0	0
Total Cars	34,122	28,125	3,012	1,622
Cars Retired:				
Box	29,397	36,307	12,202	14,571
Refrigerator	3,407	2,841	2,002	2,611
Gondola	2,906	9,302	6,960	7,322
Hopper	19,222	18,159	13,027	10,679
Covered Hopper	1,165	2,304	4,870	*-1921
Flat	*-337	1,306	3,641	*-1118
Other	6,222	2,539	1,145	2,546
	61,982	72,758	43,847	34,690
Cars Ordered:				
Box	19,373	8,629	150	311
Refrigerator	4,085	192	0	0
Gondola	3,472	2,054	281	2,120
Hopper	5,782	16,224	995	250
Covered Hopper	25,286	7,183	321	2,830
Flat	10,319	1,110	360	673
Other	10,652	#-160	0	30
Total Cars	78,969	35,232	2,107	6,214

*Negative retirement indicates increase in ownership in excess of new installations resulting from reclassification or transfer of equipment, purchase or lease of used equipment, etc.

#Order figures include net after cancellations. Orders for 160 "other" cars cancelled during October 1977.

Table 10.—Ownership, Serviceable Ownership, and Turnaround Time, Class I Railroads

	Fiscal Year			
	1973	1978	1983	1988
Ownership:				
Plain Box	327,853	223,705	130,217	64,018
Equipped Box	179,069	166,080	145,582	89,066
Total Box	506,922	389,785	275,799	153,084
Refrigerator	91,939	69,367	54,441	39,328
Gondola	183,236	158,150	130,400	89,905
Hopper	363,256	326,862	286,121	195,790
Covered Hopper	145,629	161,758	164,655	148,562
Flat	96,916	97,119	84,440	85,823
Other	39,300	29,446	22,315	13,069
Total Cars	1,427,198	1,232,489	1,018,171	725,561
Serviceable Cars:				
Plain Box	300,575	193,015	110,768	54,421
Equipped Box	168,580	146,174	120,502	74,330
Total Box	469,155	339,189	231,270	128,751
Refrigerator	87,512	69,971	48,295	34,706
Gondola	171,391	144,325	119,839	81,544
Hopper	345,427	306,538	268,007	178,558
Covered Hopper	140,043	152,140	151,453	139,549
Flat	92,391	90,413	78,706	82,060
Other	37,723	27,763	20,432	12,319
Total Cars	1,343,642	1,130,339	918,002	657,487

	Calendar Year—Turnaround Time, Days			
	1972	1977	1982	1987
Box	23.21	28.26	44.5	32.4
Refrigerator	32.21	36.87	47.7	41.2
Gondola	19.41	22.81	24.7	16
Hopper	14.71	15.82	16.8	12.1
Covered Hopper	20.73	24.02	34.1	25.4
Flat	12.57	14.45	16.6	10.1
Average, All Cars	19.57	22.18	26.9	18.8

Table 11.—Extension of Time Limits—Rail Proceedings, Fiscal Year 1988

Proceeding	Type of Proceeding	Notification of Extension	Reason and Duration
No. 40073, South-West Car Parts v. Missouri Pacific Railroad Company	Complaint	December 30, 1987	90-day extension to consider complex legal issues.
		March 4, 1988	90-day extension to consider complex legal issues.
		May 18, 1988	90-day extension to consider complex legal issues
		August 22, 1988	90-day extension to consider complex legal issues
No. 38301S, Coal Trading Corporation, et al. v. Baltimore & Ohio Railroad, et al.		October 29, 1987	150-day extension to conduct oral hearings and to consider complex legal issues.

APPENDIX C

PUBLICATIONS

The Commission issues many pubications of general interest as well as those directed to the consumer. The Commission additionally issues technical and statistical publications dealing with transportation regulation.

Publications followed by an asterisk may be purchased from the Government Printing Office. For convenience, the GPO stock number has been included. Price information may be obtained by contacting:

Superintendent of Documents
Government Printing Office
Washington, D.C. 20402
Telephone (202) 783-3238

Publications without an asterisk may be obtained free of charge by writing to the ICC office listed after the title.

- Bureau of Accounts (AC)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Compliance and Consumer Assistance (OCCA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Government and Public Affairs (OGPA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of the Secretary (SE)
  Publications Room (Rm. B-221)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Transportation Analysis (OTA)
  Interstate Commerce Commission
  Washington, D.C. 20423
- Office of Public Assistance (OPA)
  Interstate Commerce Commission
  Washington, D.C. 20423

ANNUAL REPORTS OF COMPANIES

These reports may be examined in the Bureau of Accounts' Public Reference Room, Room 3378, from 8:30 a.m. to 5:00 p.m. weekdays. Photocopies of these reports, at a cost of 50 cents per page, with a $3.00 minimum charge per order, may be obtained by writing to the Office of the Secretary, Room 2215, ICC, Washington, D.C. 20423.

COMMISSION DECISIONS

Individual copies of the Commission's decisions may be obtained up to one year from the date of service from Dynamic Concepts, Inc. (DCI), Room 2229, ICC, Washington, D.C. 20423, or by calling (202) 289-4357 or 289-4359. Printed reports in the "ICC" and "MCC" series are also available from the Commission's Publications Room while supplies last. Printed reports in the "ICC 2nd Series" only are available through DCI.

CONSUMER PUBLICATIONS

OCP-100 When You Move: Your Rights and Responsibilities—OCCA

This booklet explains consumer rights when moving household goods across state lines.

GENERAL PUBLICATIONS

Annual Reports of the Commission to Congress

94th 1980 (026-000-01195-7)*
95th 1981 (026-000-01225-2)*
96th 1982 Out of print
97th 1983 (026-000-01238-4)*
98th 1984 (026-000-01247-3)*
99th 1985 (026-000-01250-3)*
100th 1986 (026-000-01256-2)*
101st 1987 (026-000-01258-9)*

Code of Federal Regulations, Title 49, Revised to October 1987

Parts 1000-1199: General provisions, enforcement, motor carriers, freight forwarders, intermodal transportation, rules of practice, railroad consolidation, finance and reorganization special procedures. (022-003-94228-9)*

Parts 1200-End: Uniform system of accounts, preservation of records, reports, valuation, handling of national security information and classified material, passenger and freight tariffs and schedules, credit regulations and general.

Interstate Commerce Act

Available from the Government Printing Office in U.S. Code, 49 U.S.C. Sec. 10101 et seq.*

ICC Register

A daily summary of motor carrier applications and of decisions and notices issued by the ICC. Subscription information is available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Telephone (202) 783-3238.

INFORMATIONAL PUBLICATIONS

Department of Transportation and State Regulations—Bulletin No. 9—OPA

Fees for Various and Related Services of the Interstate Commerce Commission—OPA (February 1988)

Government Traffic—Bulletin No. 3—OPA

Guide to Applying for Permanent Operating Authority: Passengers—OPA (May 1988)

Guide to Applying for Permanent Authority—OPA (February 1988)

Guide to Applying for Temporary or Emergency Temporary Operating Authority—OPA (February 1988)

Guide to Filing Protests, Replies and Appeals—Bulletin No. 6—OPA

Highlights of the Bus Regulatory Reform Act of 1982—Bulletin No. 2—OPA

Highlights of the Motor Carrier Act of 1980—Bulletin No. 1—OPA

Public Participation in Interstate Commerce Commission Cases Under the Bus Regulatory Reform Act of 1982—OPA

Public Participation in Rail Abandonment Cases Under the Interstate Commerce Act—OPA (December 1986)

Illegal Lumping—OCCA

Addresses illegal "lumper" practices

Lease-Purchase Plans—OPA

Sample Caption Summaries—Bulletin No. 7—OPA

Self-Help Against Unauthorized Operations—OCCA

Small Carrier Transfer and Name Change Procedures—OPA (April 1988)

So You Want to Start a Small Railroad—ICC Small Railroad Application Procedures—OPA (August 1987)

Speeches and Statements—OGPA

ICC Commissioners' speeches or statements before Congressional committees may be obtained on an individual basis from the Office of Government and Public Affairs, Room 4111, ICC, Washington, D.C. 20423. Telephone (202) 275-7252.

State Regulatory Commissions and Fuel Tax Divisions—Bulletin No. 10—OPA

SPECIALIZED PUBLICATIONS

Motor

Customer Pickup of Food and Grocery Products Under Section 8 of the Motor Carrier Act of 1980—OTA

Minority and Female Motor Carrier Profile—OPA (October 1986)

Minority and Female Motor Carrier Listings—OPA (October 1988)

Staff Reports No. 11—Highlights of Activity in the Property Motor Carrier Industry—OTA

Transport Statistics in the U.S.: Motor Carriers—SE

(First Release, Part 2, 1986)
(Second Release, Part 2, 1986)

Rail

Class I Line-Haul Railroads, Selected Earnings Data—SE (Quarterly)

Effects of the Boxcar Exemption—OTA

Before You Start a Small Railroad: A Brief Overview of Things to Consider—OPA (September 1988)

Railroad TOFC/COFC Monitoring Study—OTA (December 1985)

Report of Railroad Employment Class I Line-Haul Railroads—SE

Wage Statistics of Class I Railroads in the U.S.—SE

Statement No. M-350 (monthly)

Transport Statistics in the U.S.: Railroads (First Release, 1986)—SE

Statement No. A-300 (Calendar 1987)

URCS-Uniform Railroad Costing System, 1980 Railroads Cost Study—AC

Technical documentation and explanation of the Uniform Railroad Costing System (December 1982)

URCS—Uniform Railroad Costing System, 1980 Rail Carload Cost Scales—AC

Documentation and regional data for manual calculations under the Uniform Railroad Costing System (April 1983)

URCS—Uniform Railroad Costing System, Phase II, Movement Costing Program User's Manual—AC

Description of the independent interactive computer program for estimating cost of specific, individual rail movements (April 1983)

URCS—Uniform Railroad Costing System, Phase II, Movement Costing Program Technical Manual—AC

Description of Fortran costing programs compatible to Data General Corporation (DEC) and IBM equipment (April 1983)

General

The Commission's Bureau of Accounts publishes quarterly reports on selected earnings data—AC

- *Large Class I Motor Carriers of Property;*
- *Large Class I Motor Carriers of Passengers; and*
- *Large Class I Household Carriers*

APPENDIX D

Appropriations and Employment

The following statement shows average full-time employment and total appropriations for the fiscal years 1953 to 1988 for activities included under the current appropriation title "Salaries and Expenses."

Year	Appropriation	Average Employment	Year	Appropriation	Average Employment
1954 ...	11,284,000	1,838	1972 ...	30,640,000	1,676
1955 ...	11,679,655	1,859	1973 ...	33,720,000	1,765
1956 ...	12,896,000	1,902	1974 ...	40,681,000	1,874
1957 ...	14,879,696	2,090	1975 ...	44,970,000	1,986
1958 ...	17,412,375	2,238	1976 ...	52,455,000	2,034
1959 ...	18,747,800	2,268	TQ	12,290,000	2,113
1960 ...	19,650,000	2,344	1977 ...	60,786,000	2,084
1961 ...	21,451,500	2,386	1978 ...	65,575,000	2,040
1962 ...	22,075,000	2,400	1979 ...	70,400,000	2,040
1963 ...	23,502,800	2,413	1980 ...	79,063,000	1,946
1964 ...	24,670,000	2,408	1981 ...	82,400,000	1,852
1965 ...	26,715,000	2,339	1982 ...	70,150,000	1,540
1966 ...	27,540,000	2,376	1983 ...	65,600,000	1,319
1967 ...	27,169,000	1,929	1984 ...	60,000,000	1,158
1968 ...	23,846,000	1,899	1985 ...	51,100,000	915
1969 ...	24,664,000	1,808	1986 ...	48,408,000	806
1970 ...	27,742,660	1,802	1987 ...	46,802,000	732
1971 ...	28,442,000	1,731	1988 ...	44,294,000	712

Status of Appropriations

Status of fiscal year 1988 appropriations as of September 30, 1988:

Salaries and expenses:	
Total appropriations	$44,294,000
Reimbursements	104,583
Total obligations	43,953,493
Unobligated balance lapsing	445,090
Directed Rail Service:	
Unobligated balance available from prior appropriation	—0—
Total obligations:	
Payments to carriers	—0—
Recoveries of prior years' obligations	—0—
Unobligated balance available (end of year)	—0—

Receipts

Status of receipt accounts as of September 30, 1988

Registration and filing fees	$4,858,819
Fines, penalties and forfeitures	67,173
Service charges for allotments of pay for savings account	—0—
Charges for administrative services	47,212
Recoveries from railroad loan guarantees	—0—
Miscellaneous recoveries and refunds	13,731
Withholding for military benefits	—0—
Total Receipts	4,986,935

APPENDIX E

Carrier Financial and Statistical Data

Table 1.—Carriers regulated by the Commission

	Number
Carriers subject to Uniform System of Accounts and/or required to file annual & periodic reports as of Dec. 31, 1988:	
Railroads, class I[1]	19
Motor Carriers, class I passengers[2]	33
Motor Carriers, class I property[3]	889
Motor Carriers, class II property[4]	1,179
Holding companies (rail)	3
TOTAL	2,123
Carriers and organizations not filing reports as of Dec. 31, 1988:	
Railroads, class II[5]	23
Railroads, class III[6]	321
Railroads, Other	204
Carlines (companies that furnish cars used on rail lines)	166
Holding companies (motor)	74
Motor carriers of passengers, other than class I	3,472
Classes I and II motor carriers of property relieved from reporting	359
Class III motor carriers of property	37,182
Water carriers	326
Freight forwarders	553
Rate bureaus and organizations	70
Coal slurry pipeline company	1
Protective service companies	6
TOTAL	42,757
GRAND TOTAL	44,880

[1]Railroad companies having adjusted annual operating revenues of $50,000,000 or more for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenue total is multiplied by a deflator factor based on Railroad Freight Index. For 1986, 1987, and 1988, the deflator factors are .5647, .5686, and .5435, respectively.

[2]Motor Carriers having annual operating revenues in excess of $5,000,000.

[3]Motor carriers having adjusted annual operating revenues in excess of $5,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each motor carrier's gross annual operating revenues total is multiplied by a deflator factor based on the Producers Price Index for all commodities. For 1986, 1987, and 1988, the deflator were .8859, .8647, and .8400, respectively.

[4]Motor carriers having adjusted annual operating revenues less than $5,000,000 but in excess of $1,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each motor carrier's gross annual operating revenues total is multiplied by a deflator factor based on the Producers Price Index for all commodities. For 1986, 1987, and 1988, the deflator factors were .8859, .8647 and .8400, respectively.

[5]Railroad companies having adjusted annual operating revenues less than $50,000,000 but in excess of $10,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenue total is multiplied by a deflator factor based on Railroad Freight Index. For 1986, 1987, and 1988, the deflator factors are .5647, .5686, and .5435.

[6]Railroad companies having adjusted annual operating revenues of less than $10,000,000 for three consecutive years. Revenues are adjusted annually to eliminate the effects of inflation from the classification process. Each railroad's gross annual operating revenues total is multiplied by a deflator factor based on Railroad Freight Index. For 1986, 1987, and 1988, the deflator factors are .5647, .5686, and .5435, respectively.

Table 2.—Recapitulation of preliminary 1987 operating revenues, net investment and taxes (dollars in thousands)

Carrier Type	Number of Carriers Represented[1]	Operating Revenues	Net Investments	Income Taxes on Ordinary Income[2]
Railroads—Class I line haul	18	$26,622,482	$35,768,874	$964,862
Motor carriers of property—				
Class I intercity	645	36,077,856	9,220,570	344,563
Motor carriers of passengers—				
Class I intercity	32	1,078,905	N/A	-11,027
Total	695	63,779,243	44,989,444	1,298,398
		Percentage distribution		
Railroads—Class I line haul	2.6	41.7	79.5	73.7
Motor carriers of property—				
Class I intercity	92.8	56.6	20.5	26.3
Motor carriers of passengers—				
Class I intercity	4.6	1.7	N.A	—
Total	100.0	100.0	100.0	100.0

[1]Carriers for which preliminary financial and statistical data were available.

[2]Federal income taxes and provisions for deferred taxes only for railroads; all other carriers include Federal and state income taxes, and provisions for taxes.

Table 3.—Class I line-haul railroads shareholders' equity, long-term debt and dividends (dollars in thousands)

Item	1985	1986	1987
1. Shareholders' equity			
a. Capital stock	$ 3,865,225	$ 3,483,360	$ 3,024,635
b. Capital surplus	6,495,854	6,258,979	6,094,608
c. Retained income	17,244,132	15,699,282	16,496,846
d. Total equity	27,605,211	25,441,621	25,616,089
2. Long-term debt	10,483,619	10,183,266	8,703,420
3. Total equity and debt	38,088,830	35,624,887	34,319,509
4. Ratio of debt to total equity and debt (percent)	27.52	28.58	25.36
5. Amount of dividends			
a. Cash	$ 1,433,071	$ 1,376,532	$ 1,252,293

Table 4.—Class I line-haul railroads, condensed income statement, financial ratios and employee data (dollars in thousands)

Item	1985	1986	1987
1. Number of carriers represented ...	24	18	18
CONDENSED INCOME STATEMENT			
2. Operating revenues:			
a. Freight	$26,687,652	$25,343,911	$25,797,002
b. Passenger	103,205	107,717	93,559
c. Total operating revenues	27,586,441	26,204,122	26,622,482
3. Total operating expenses	25,225,295	24,896,015	23,878,116
4. Railway tax accruals	2,722,588	2,938,765	3,182,853
5. Net railway operating income	1,746,386	506,990	1,756,460
6. Ordinary income	1,788,151	746,965	1,965,475
7. Extraordinary items—Net[1]	93,371	-202,558	89,746
8. Net income	1,881,522	544,407	2,055,221
NET INVESTMENT AND EQUITY			
9. Net investment in transportation property and equipment plus working capital[2]	36,050,119	35,657,291	35,768,874
10. Shareholders' equity	27,605,211	25,441,621	25,616,089
FINANCIAL RATIO (PERCENT)			
11. Operating ratio (L.3 ÷ L.2c)	91.44	95.01	89.69
12. Return on net investment (L.5 ÷ L.9)	4.84	1.42	4.91
13. Return on equity:			
a. Ordinary income basis (L.6 ÷ L.10)	6.48	2.94	7.67
b. Net income basis (L.8 ÷ L.10) ...	6.82	2.14	8.02
EMPLOYEE DATA			
14. Average number	301,879	275,817	248,526
15. Compensation:			
a. Total	$10,563,033	$ 9,918,673	$ 9,373,470
b. Per hour paid for	14.299	14.779	15.112

[1]Includes income taces on extraordinary items and discontinued operations and accounting changes.

[2]Accumulated deferred income tax reserves have been subtracted from the net investment base in accordance with the modification approved by the Commission in Ex Parte No. 393 (Sub. No. 1), *Standards for Railroad Revenue Adequacy*, served December 31, 1986.

NOTE: Net railway operating income, ordinary income and net income for the years 1985, 1986 and 1987 were substantially reduced due to large accounting adjustments by some railroads to record severance pay for employee buyouts and the write-down of assets attributable to freight car retirements and line abandonments.

Table 5.—Class I line-haul railroads' current assets and current liabilities of December 31, 1986 and 1987 (dollars in thousands)

Item	1986 Amount	Percent of change	1987 Amount	Percent of change
Total current assets	$9,132,495	-2.3	$8,215,561	-10.0
Cash and temporary cash investments	2,660,145	+.3	2,327,382	-12.5
Materials and supplies	927,718	-18.9	866,251	-6.6
Total current liabilities	8,389,756	+1.5	8,181,480	-2.5
Net working capital:				
Including materials and supplies	742,739	-31.5	34,081	-95.4
Excluding materials and supplies	-184,979		-832,170	
Ratios:				
Current assets to current liabilities				
Including materials and supplies	1.09		1.00	
Excluding materials and supplies	.98		.90	
Cash and temporary cash investments to current liabilities	.32		.28	

Table 6.—Class I intercity motor carriers of property condensed income statement, financial ratios and employee data (dollars in thousands)

Item	1985	1986	1987[1]
1. Number of carriers represented	738	710	645
CONDENSED INCOME STATEMENT			
2. Operating revenues:			
a. Freight-intercity-common carrier	$29,018,909	$30,053,755	$29,511,100
b. Freight-intercity-contract carrier	2,518,194	2,590,353	2,986,595
c. Freight-local cartage	272,406	267,611	273,639
d. Intercity transportation for other motor carriers	183,292	197,091	166,150
e. Other operating revenue	2,909,532	3,093,244	3,140,372
f. Total operating revenues	34,902,333	36,202,054	36,077,856
3. Operating expenses	33,231,347	34,132,068	34,944,494
4. Lease of distinct operating unit-net	453	966	1,267
5. Net carrier operating income	1,671,439	2,070,932	1,134,629
6. Other income and miscellaneous deductions from income-net	-168,436	-219,046	-224,114
7. Income taxes on ordinary income[2]	678,692	807,439	344,563
8. Ordinary income	824,311	1,044,447	565,952
9. Extraordinary items-net[3]	51,418	25,886	33,336
10. Net income	875,729	1,070,333	599,288
NET INVESTMENT AND EQUITY			
11. Net investment in carrier operating property and equipment plus working capital	8,607,571	9,254,949	9,220,570
12. Shareholders' and proprietors' equity	6,578,463	7,095,236	8,382,761
FINANCIAL RATIOS (PERCENT)			
13. Operating ratio (L.3 ÷ L.2f)	95.21	94.28	96.86
14. Return on net investment (L.5 ÷ L.11)	19.42	22.38	12.31
15. Return on equity (L.10 ÷ L.12)	13.31	15.09	7.15
EMPLOYEE DATA			
16. Average number	484,539	502,538	520,661
17. Compensation	$12,871,562	$13,438,121	$14,009,606

[1]Preliminary.

[2]Does not include income taxes applicable to sole proprietorships, partnerships, and corporations that have elected to be taxed under Sec. 1372(a) of the Internal Revenue Code. Also does not include income taxes on extraordinary items. Includes provision for deferred taxes.

[3]Includes income taxes on extraordinary items and discontinued operations and accounting changes.

Table 7.—Class I intercity motor carriers of passengers condensed income statement, and financial ratios (dollars in thousands)

Item	1985	1986	1987[1]
1. Number of carriers represented ...	43	29[2]	32
CONDENSED INCOME STATEMENT			
2. Operating revenues:			
a. Passenger intercity schedules .	$ 836,122	$ 764,504	$ 751,643
b. Local and suburban schedules .	5,144	3,703	5,631
c. Charter or special service.....	178,836	152,816	160,408
d. Other operating revenue.....	212,975	196,297	161,223
e. Total operating revenues	1,233,077	1,117,320	1,078,905
3. Operating expenses.....	1,167,631	1,082,074	1,080,573
4. Net carrier operating income....	65,315	35,003	-1,668
5. Income tax on ordinary income[3]...	12,604	13,928	-11,027
6. Ordinary income.....	52,818	36,475	-21,577
7. Extraordinary items—net[4]	-198	-181	—
8. Net income	52,620	36,294	-21,577
9. Shareholders' equity	544,417	483,993	150,630
FINANCIAL RATIOS (PERCENT)			
10. Operating ratio (L.3 ÷ L.2e)	94.69	96.85	100.15
11. Return on equity (L.8 ÷ L.9)	9.67	7.50	—

[1]Preliminary.

[2]The large decline in the number of Class I bus companies between 1985 and 1986 is attributable primarily to a merger, effective January 1, 1986, of the wholly owned motor carrier of passengers subsidiaries of Trailways Lines, Inc. into Trailway Lines, Inc., pursuant to Commission approval in No. MC-F-16480, *Trailways Lines, Inc.—Merger—Trailways Bus System, Inc., et al.* served November 19, 1985.

[3]Does not include income taxes applicable to sole proprietorships, partnerships, and corporations that have elected to be taxed under Sec. 1372(a) of the Internal Revenue Code. Also does not include taxes on extraordinary items. Includes provision for deferred taxes.

[4]Includes income taxes on extraordinary items and discontinued operations and accounting changes.

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